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# MECHANICS' LIEN LAWS IN CANADA

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WITH THE ACTS OF ONTARIO, MANITOBA, BRITISH COLUMBIA,  
NOVA SCOTIA, AND NEW BRUNSWICK, AND THE  
ORDINANCES OF ALBERTA AND SASKATCHEWAN  
RELATING THERETO, AND ANNOTATIONS  
AND FORMS OF PROCEEDINGS  
THEREUNDER;

AND ALSO THE ARTICLES OF THE QUEBEC CIVIL CODE  
DEALING WITH MECHANICS' LIENS, AND A  
DIGEST OF CASES IN CONNECTION  
THEREWITH.

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BY

WILLIAM BERNARD WALLACE, LL.B.

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## PREFACE.

The decisions upon the Mechanics' Lien Acts existing in various Provinces in Canada and the amendments to the Statutes dealing with this subject have been so numerous of recent years, and the subject itself has become so extensive as to warrant the publication of a new treatise. While fully sensible of imperfections in the execution of this work, it is, nevertheless, hoped that it may prove useful to the profession.

There are some variations in the Statutes of the different Provinces on this subject, but, very few of them are substantial and the main sections of the various Statutes are so nearly alike as to make the decisions in one Province of value to the practitioners in the other Provinces. Moreover, it is thought that judicial interpretations of similar sections in the Statutes existing in various States in the adjoining Republic will be useful to the practitioners in Canada. Statutes in New York, Massachusetts, Pennsylvania and other States of the Union, on this subject use, with very little variation, the phrases of the sections used in the Mechanics' Lien Acts existing in various Provinces in Canada, and it is felt that, as there are certain principles common to the jurisprudence of both countries, the decisions that have expounded the Statutes which have been enacted in various States of the Union will aid either directly, or by analogy, in the construction of similar Acts passed by our Provincial Legislatures.

Bramwell, B., in *Osborn v. Gillett*, (1873) L.R. 8 Exch. 92, said, in speaking of United States decisions on another branch of the law:

"The American authorities are not binding on us indeed, but are entitled to respect as the opinion of professors of English law and entitled to respect according to the positions of those professors and the reason they give for their opinions."

The late Mr. Justice Thompson of Nova Scotia in one case



referred to the value of United States decisions and quoted approvingly what Chief Justice Cockburn said in *Scaramanga v. Stamp*, L.R. 5 C.P.D. 303: "Although the decisions of the American courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law, a law, except so far as altered by statutory enactment, derived from a common source with our own, entitle their decisions to the utmost respect and confidence on our part." Such observations must apply with special force to decisions of United States courts construing Statutes which the Provincial Legislatures in Canada have utilized in framing their own Mechanics' Lien Acts.

Times have greatly changed since the Court of Queen's Bench of Upper Canada, under the presidency of Chief Justice Draper, actually declined to make a note of any United States case cited on any question of law.

As the Mechanics' Lien Act of Ontario, the parent Statute, is in its main provisions, similar to the legislation on the same subject in Manitoba, British Columbia, Nova Scotia, New Brunswick, Alberta and Saskatchewan, and the largest amount of judicial interpretation has been given to the Ontario Statute, it has been deemed best to group, under appropriate sections of that Statute, all the decisions given in Canada that have been obtainable and to publish the Mechanics' Lien Acts of the other Provinces with merely the essential notes and cross-references. Prince Edward Island has no Mechanics' Lien Act. The Articles of the Civil Code of Quebec dealing with the same subject are also published, with decisions of the courts of Quebec relating to them.

The writer must acknowledge his obligations to Mr. A. A. Mackay, B.A., LL.B., Law Clerk of the Nova Scotia Assembly, whose valuable services have greatly improved the volume.

In the selection of cases illustrating the Quebec law valuable aid has been given by Mr. H. J. Kavanagh, K.C., of the Quebec Bar.

September, 1905.

W. B. W.

# COMPARATIVE TABLE OF THE MECHANICS' LIEN ACTS

Of Ontario, Manitoba, British Columbia, Nova Scotia, New Brunswick, Alberta and Saskatchewan, showing the corresponding sections in each Act.

Ontario	Manitoba	British Columbia	Nova Scotia	New Brunswick	Alberta & Saskatchewan
Sections	Sections	Sections	Sections	Sections	Sections
1	1	1	1	1	1
2	2	2	2	2	2
" (1)	" (a)	2 (1) & ch. 20 s. 2, 1900	" (a)	" (1)	" (1)
" (2)	" (b)	2 (2) & ch. 20 s. 3, 1900	" (b)	" (2)	" (2)
" (3)	" (c)	2 (3) & ch. 20 s. 3, 1900	" (c)	cf. (3)	" (3)
.....	.....	.....	.....	(4)	.....
.....	.....	.....	.....	(5)	.....
.....	.....	.....	.....	(6)	.....
.....	.....	(4)	.....	.....	.....
.....	.....	(5)	.....	.....	.....
" (4)	" (d)	.....	" (d)	.....	.....
" (5)	" (e)	(6) & ch. 20 s. 6, 1900	" (e)	.....	.....
" (6)	" (h)	ch. 20, s. 17 (a), 1900	" (f)	.....	.....
" (7)	" (f)	.....	" (g)	cf. (7), (8)	.....
3 (1)	.....	.....	.....	.....	.....
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Ontario	Manitoba	British Columbia	Nova Scotia	New Brunswick	Alberta & Saskatchewan
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" (3)	" (b)		" (3)		
" (4)	" (c)	cf. 12	" (4)		
" (5)	" (d)	cf. ch. 20, s. 22, 1900	" (5)	6 (3)	
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16 (1)	13	11	12 (1)	cf. 14	cf. 15, 30
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" (3)	cf. " (b)	cf. ch. 20, s. 9, 1900	cf. 13		
17 (1)	cf. 14	cf. ch. 20, s. 12, 1900	cf. 15 (1)	cf. 15 (1)	16
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" B	" (b)	" " "	" (b)	" (b)	" (b)
" C	" (c)	" " "	" (c)	" (c)	" (c)
" D	cf. " (d)	" " "	" (d)	" (d)	" (d)
" E	" (e)	" " "	" (e)	" (e)	" (e)
" (2)	" (f)	" " "	" (2)	" (2)	" (2)
" (3)			" (3)		
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" (4)	" (c)		20 (3)	" " "	" " "
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Ontario	Manitoba	British Columbia	Nova Scotia	New Brunswick	Alberta & Saskatchewan
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Ontario	Manitoba	British Columbia	Nova Scotia	New Brunswick	Alberta & Saskat- chewan
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# THE LAW OF MECHANICS' LIENS IN CANADA.

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## CHAPTER I.

### HISTORICAL.

#### THE DEVELOPMENT OF THE LIEN UPON REALTY.

A common law lien has been judicially defined to be, "A right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." Grose J. in *Hammonds v. Barclay* (1802) 2 East 235. This right to so retain the property, upon which he had performed labor and thereby added to its value, only applied to personal property. At common law a mechanic had no lien upon a building for labor done upon it and could not retain possession of realty upon which he had performed labor. Even at as early a period as the year 1835 this question was discussed in an Ontario case (*Johnson v. Crew* 5 U.C.Q.B. (O. S.) 200), where a builder, having performed work on a house, withheld possession and insisted that his claim must first be paid. It was decided in that case that the builder had no lien and that no action would lie for his claim until the absolute delivery of the house. Robinson, C.J., said: "On general principles and in ordinary cases a builder has no lien on the house which he has built or repaired,—it would be most inconvenient that he should have. The ground on which it stands is inseparable from the house and such a lien would exclude the owner

from his own freehold." Macaulay, J., said:—"Contractors for such work must rely on the personal liability of their employer under the contract, in an express security guaranteed by substantive agreement. No lien results in law in their favor by reason of the expenditure of their toil and material on the estate and for the benefit of the owner."

It required a statute, therefore, to create this lien and it was not until the year 1873 that this right was created in Ontario, which was the first Province in Canada to enact a Mechanics' Lien Law. (36 Vict. ch. 27.)

### ORIGIN OF THE LAW.

Ontario, doubtless, adopted the system of Mechanics' Liens from the statutes prevailing in many of the States of the neighboring Republic. Such a system is unknown to the law of England. The actual cause which led to the introduction of the system in the United States is not known. Phillips, in his treatise on Mechanics' Liens, states that it has been supposed by some that in Pennsylvania, which was one of the first States to establish the system, it owed its existence to the analogous provisions contained in the Act of that commonwealth of 1784 relating to persons employed in building and repairing vessels, and others seem inclined to trace its origin exclusively to the necessity in a young and growing country of fostering mechanical and industrial pursuits, and the manifest equity of dedicating primarily buildings and the land upon which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value. (Phillips, 3rd Ed. S. 6). But is it not probable that the origin of the system is traceable to the circumstance that many of the new settlers in that country were mechanics, who came from continental countries where laws existed based on the civil law, which has so deeply influenced the jurisprudence of the civilized world, and that these workmen having had the beneficial

experience of the civil law provisions which protected the contractor and mechanic and clearly defined and regulated their interests, would naturally press for the like privilege to be given them in their adopted country? The civil code of Louisiana is directly traceable to this source and in regard to mechanics and laborers is practically a re-enactment of the provisions of the civil law. The enactment by the British Parliament of the famous "Quebec Act" of 1774, which extended the limits of the Province southward to the Ohio and westward to the Mississippi, restored the civil law to the people living within that extensive territory and it is probable that the provisions of that law protecting mechanics were familiar to many workmen who afterwards became residents of adjoining States and who would quickly join in a movement for the securing of a statutory law with similar provisions for their protection.

Moreover there were many thousands of Dutch settlers not only in New York but along the Delaware and in Maryland and Pennsylvania, (see Pennsylvania Archives vol. 1 by Samuel Hazard), and these settlers and their relatives and friends who followed them to their new homes had lived under the civil law in Holland, and the mechanics among them would naturally agitate to secure an enactment giving them similar protection in their adopted country.

It is not unlikely, therefore, that the provisions of the civil law constituted the foundation for the system of Mechanics' Liens now prevailing on this continent.

In the United States, the first statute creating such a lien was enacted by the General Assembly of Maryland in 1791. This was followed by a measure passed by the Legislature of Pennsylvania in 1803. In 1819 the Legislature of Massachusetts passed a Mechanics' Lien Act which was re-enacted in Maine in 1821. As illustrating the meagre character of these early statutes it is worthy of note that the Massachusetts Act gave a lien only to one who had made a written contract with the owner, and the first Pennsylvania Act made the lien apply only

for debts contracted by the owner of the property in connection with work done or materials furnished for the building, and the contractor himself was not entitled to any lien under the Act. The primary purpose of that statute was not to secure the contractor but the mechanics and dealers who were liable to lose through him. The whole statute consisted only of two sections and was contained in about thirty lines.

### INITIAL DIFFICULTIES.

The legislative germ introduced in Ontario in 1873 gave little promise of long life or future development. It was an exasperation to the owners of real estate and in many cases was a disappointment to persons claiming a lien. It was publicly stigmatised as being of profit to no one save the lawyers and it was suspected of being the offspring of the wanton wooing of the workingman's vote. The Act was vigorously condemned in the press by suitors who had invoked it unsuccessfully.

Looking back to that period, it is not surprising that the new Act was unpopular. It was good so far as it went but it did not go far enough and there was the inevitable accompaniment of ambiguity in respect to some of its terms. It existed only in favor of the direct contractor with the owner and there was a perilous perplexity and haziness about the scope of the word "owner," who was, as one judge expressed it, "environed with great perils." Sub-contractors disliked the statute because it did not give them the right to a lien on the land and left them unprotected from fraud. They were entitled to have their claims paid out of any money due by the owner to the contractor, but that privilege was speedily discovered in many cases to be illusory and valueless, inasmuch as by the time the owner received from them the necessary notice of their claims there was nothing due by him to the contractor and therefore nothing to pay to the sub-contractors. This defect was remedied in 1874. (37 Vict. ch. 20). After further amendments to

the law and the decision in a leading case (*Bank of Montreal v. Haffner*, (1884) 10 A.R. 592) there was a clearer understanding of the scope of the word "owner." In 1877 there was a consolidation of the Acts. (R. S. O. (1877) ch. 120). For some years there was contention between lien-holders and other incumbrancers for priority, (*Douglas v. Chamberlain*, (1878) 25 Gr. 289; *Richards v. Chamberlain*, (1878) 25 Gr. 402) and there appeared to be general dissatisfaction with the statute. An editorial appeared in 1876 in the sedate columns of a law journal (12 C.L.J. 300) vehemently demanding the repeal of the Act, and describing it as, "that most absurd and hurtful of all illogical legislation." In the following year another editorial appeared in the same journal (13 C.L.J. 9.) which, after referring to a particular case (*Walker v. Walton* 13 C.L.J. 8; 24 Gr. 209) as a specific instance of the unsatisfactory character of the Act denounced the whole measure as unjust, absurd and unintelligible.

It should be noted that the case which provoked this violent attack upon the Act was reversed on appeal. *Walker v. Walton*, (1877) 1 A.R. 579.

#### IMPORTANT AMENDMENTS.

When, by further amendments to the Act, the legislature sought to protect the sub-contractors and material men by giving each of them a lien, the law was often misunderstood by the sub-contractors and material men, who in many instances suffered loss because they failed to realize the importance of the doctrine enunciated by Mr. Justice Proudfoot, when he said: "The American statutes, so far as I have been able to refer to them, contain no definitions of the term *owner*, but the courts have construed it to be the correlative of *contractor*, and to mean the person who employs the contractor, and for whom the work is done under the contract. Our statute seems to have framed the definition in accordance with this course of



decision.” *Bank of Montreal v. Haffner*, (1881) 29 Gr. 319. The contractor and material men, however, felt that it was unreasonable that anything more should be required to be shown by them to secure their claims than to prove the ownership of an interest in the land and the doing of the work benefiting the owner of that interest. Moreover, wage-earners were dissatisfied with the Act because there was no adequate protection for them against the dishonesty of contractors. In order to afford ample protection to wage-earners, amendments to the Act were made in 1882 (45 Vict. ch. 15) and further amendments in 1884 (47 Vict. ch. 18) and in 1887 (50 Vict. ch. 20). By these later amendments a better status was given to the lien for wages; all agreements made for the purpose of preventing the attaching of mechanics' liens were declared void, except as between the actual parties to such agreements, and the procedure for enforcing and discharging liens was improved. The next consolidation was in 1887, (R.S.O. (1887) ch. 126), and further amendments were made in 1889 (52 Vict. ch. 37; 52 Vict. ch. 38), one amendment directing a special procedure for the enforcement of the lien, and the later amendment making a change in the percentage required to be retained by an owner. In 1893 by an amending Act the procedure for the enforcement of the lien was further improved. All these Acts were repealed in 1896 by 59 Vict. ch. 35, and there was a subsequent consolidation in 1897 (R.S.O. (1897) ch. 157) of the Act of 1896, as amended by 60 Vict. ch. 24. Further amendments were made in 1901 (1 Edw. VII. ch. 12); 1902 (2 Edw. VII. ch. 21); and 1904 (3 Edw. VII. ch. 2).

For some time there had been contention in regard to the construction of the word “completion” of the work, but finally in the case of *Neill v. Carroll*, affirmed on re-hearing (see *Summers v. Beard*, 24 O.R. 641), it was established that “completion” meant substantial completion and that the subsequent supplying of trifling imperfections would not have the effect



of prolonging the time for the registration of the lien or for bringing the action to enforce the lien.

When the right to a lien was extended to sub-contractors it proved, in many instances, an expensive and useless right because there was no machinery accompanying it which would enable sub-contractors to ascertain speedily the amount due by the owner to the contractor. Eventually a provision was adopted for the further protection of sub-contractors which provision is now embodied in section 11 of the present Act. Another defect in the statute, which impaired its value to sub-contractors, arose from the fact that a contractor could by his agreement deprive all sub-contractors under him of the right of lien, and it was not until 1884 (47 Vict. ch. 18) that the defect was remedied.

It was, of course, very difficult to anticipate and provide for the innumerable questions which ultimately arose concerning the scope and meaning of the terms of a statute of this novel nature. The ambiguity of some of its sections was the subject of occasional comment by the courts. Even at so late a period as 1885 Chancellor Boyd, in one case (*Graham v. Williams*, 8 O.R. 478), expressed regret that he could not exempt the plaintiff from costs "incurred in endeavoring to discover the true meaning of the mechanics' lien law."

The experiences of Manitoba, British Columbia, Nova Scotia New Brunswick and the North-West Territories were not so troublesome, as by the time enactments on this subject had been passed by the legislatures of those sections of Canada the path had been made fairly smooth.

Contrasting the meagre, inadequate and inequitable provisions of the Ontario Act of 1873 with the comprehensive and just provisions of the present Act, based as it is on a due regard to the rights of all parties, great progress may fairly be claimed along a somewhat thorny and troublesome path, where conflicting rights compelled the legislator to proceed cautiously lest the honest endeavor to do full justice to one class might involve

injustice to another class. There has been a slow but steady widening of the remedy, so that, while the remedy itself has been made more effective, it has also been extended so as to include new classes of persons equally entitled to invoke it. It is not claimed that even to-day the legislation on this subject has anticipated and effectively dealt with all possible contingencies and is complete and perfect. Further legislation, doubtless, will be necessary from time to time to meet new conditions and to cope with the ingenuity of those desirous of evading the provisions of the Act, but when the difficulties of the subject are considered it must be conceded that the Mechanics' Lien Acts as they exist to-day in this country, are distinctly beneficial and just measures. It was feared by some persons that the Acts would be oppressive to the owners of real estate but it is now universally recognized that these measures are not more onerous than necessity and justice demanded in order to protect those who do the work and furnish the materials by which the realty is benefited.

The value of a statute of this kind cannot be measured by the frequency with which its provisions are invoked. The mere fact that it is on the statute book constitutes in itself a wholesome, salutary and far-reaching influence in preventing attempts to defraud which might otherwise be successfully undertaken. An adequate idea of the value of the Mechanics' Lien Acts could only be afforded by their absolute repeal, as it would then be found that those classes now protected by the law, from the fraud, injustice, misfortune or improvidence of others in connection with building contracts, would have the strongest reasons for clamoring for the re-enactment of these Statutes.

## CHAPTER II.

### NATURE AND SCOPE OF THE LIEN.

A right which requires a statute to create it and also statutory words to determine the precise length of its life can be truly called a creature of the statute. There are other liens created by statute, but a mechanics' lien upon realty differs in several respects from any of them. The statutory law which bears the closest resemblance to it is that which relates to an incumbrance affixed to the realty for taxes due a municipality.

A mechanics' lien although created by operation of law is dependent upon contract, express or implied. It being considered that a person who by his labor or material enhances the value of realty belonging to others has a special right to compensation and, therefore, should have a preferred claim on such realty, the object of a Mechanics' Lien Act is to secure to him a priority of payment of the value of the work done or materials furnished by giving him a lien which attaches to the land and the structure.

This lien arises by virtue of the employment and the doing of the work or furnishing the materials, (*McNamara v. Kirkland*, (1891) 18 A.R. 276) and is given as a security only for labor done or materials furnished to be used in connection with the construction, repair or improvement of the structure. *Robock v. Peters*, (1900) 13 Man. 139. It is an interest in land. *Stewart v. Gesner*, (1881) 29 Gr. 329. It attaches only to realty and does not create an estate in the realty itself but charges the estate or interest of the "owner," as defined by the Act, with the payment of the specified claim in preference to other debts.

The lien upon registration, takes effect from the commencement of the work, or from the placing of the materials, as

against purchasers, etc., under instruments registered or unregistered. *Robock v. Peters*. (1900) 13 Man. 139; *McVean v. Tiffin*, (1885) 13 A.R. 4. It is a charge upon the whole realty, although the labor done or materials furnished may have only been connected with part of it. This is aptly illustrated in a Massachusetts case, (*Beatty v. Parker*, (1886) 141 Mass. 523) in which it was decided that a drain pipe extending from the cellar of a house in a city, through the cellar wall, yard and street into a sewer, and included in the contract for building the house, which was fitted for the use of the city water, is a part of the house, and that a lien may be maintained for the laying of this drain, it being immaterial that the fee of the street is not in the owner of the house. In a later Massachusetts case it was held that a lien might exist for grading a lot, as, if the grading were reasonably necessary to the proper construction and occupation of the house it fairly could be considered as a part of its erection. *Reid v. Berry*, (1901) 178 Mass. 260. In fact any improvements which although outside of a building are necessary for its proper use and are on the lot of land may be the subject of a lien on the land and building. Under the Pennsylvania Lien Act it was held that a gas machine, located some distance from the house but connected therewith by pipes may be the subject of a mechanics' lien. *Pennsylvania Globe Co. v. Gill*, 1 Pa. Dist. R. 538. When the work is done or the materials are furnished the lien, having attached as the work is being done, relates back to the time when the work was begun, or the materials were commenced to be furnished and takes priority over incumbrances not recorded at that time. *Ottawa Steel Castings Co. v. Dominion Supply Co.*, (1905) 41 C.L.J. 260; 5 O.W.R. 161. The registration of the claim does not create the lien but is necessary to keep it alive and maintain it against a subsequent purchaser and protect the latter from the risk of taking without notice any land affected by a lien.

In a number of cases the question whether the enforcing of



this lien is a proceeding *in rem* or *in personam* has been discussed and conflicting views have been expressed. In a case in Newfoundland (*Lynch v. Trainor*, (1893) 13 C.L.T. 426; Newfoundland L.R. (1884-1896) 744), an action to enforce a claim for wages under a Mechanics' Lien Act, it was held that such a proceeding was an action *in rem* and not *in personam*. The Newfoundland Act is almost a complete transcript of the Ontario statute. In *Howard v. Robinson*, 5 Cush. Mass, 121, Shaw, C.J., referring to this question said: The course directed by statute is conformable in part to proceedings *in rem*, and partly to those *in personam*, but the object being to charge the estate with a lien, an encumbrance wholly independent of the personal remedies which a contracting party may have, the course of proceedings must be considered as most nearly resembling a proceeding *in rem*." The view expressed by Boisot, in his treatise on Mechanics' Liens (sec. 511), will be generally regarded as an accurate statement on this point. He says: "If when we say proceeding *in rem* we mean a proceeding which is not against any person, but is directly against a thing whose state and condition are to be determined, and which results in a judgment equally binding on all persons, although not made parties to the proceedings, then a suit to foreclose a mechanics' lien cannot be said to be a proceeding *in rem*. But, if we use the term proceeding *in rem* in a larger and more general sense, as applied to actions between parties, where the direct object is to reach and dispose of property owned by them or of some interest therein, then a suit to foreclose a mechanics' lien is a proceeding *in rem*. It is perhaps, however, more accurate to say that suits to foreclose mechanics' liens are suits in the nature of proceedings *in rem* in which the object is to determine the status of certain property but which affect only those persons who are parties or privies."

A decree enforcing a mechanics' lien is a conclusive determination of the rights of the parties but it does not conclude persons who are neither parties nor privies. *Bank of Montreal v. Haffner*, (1884) 10 A.R. 599.

## WHAT A LIEN CLAIMANT MUST SHOW.

A person who claims the benefit of a mechanics' lien must show affirmatively that he is in one of the classes of persons that the statute intends to secure, and also that his claim is one of the kind that the statute secures. He must, therefore, be in one of the following classes of persons:—

(1) Those whose claims are by virtue of an agreement with the owner of the land and building or by reason of work done or materials furnished with his consent, i.e., original contractors and others having the statutory claim by consent of the owner;

(2) Those having a claim of the statutory description without any such agreement or consent, i.e., all sub-contractors (and persons whose claims are by virtue of a contract with any such sub-contractor, and who thereby come within the statutory definition of the term "sub-contractor");

(3) All laborers and wage-earners.

The lien claimant must bring himself within the terms of the local legislation. As was said by Spragge, C., in an Ontario case (*Crone v. Struthers*, (1875) 22 Gr. 248), "The lien of the plaintiff is the creature of the statute and must be limited by its provisions." See also *Mushlitt v. Silverman*, (1872) 50 N.Y. 360. Sometimes Mechanics' Lien Acts are loosely referred to as giving absolutely a lien to contractors, sub-contractors, materialmen and laborers. But such a statement is calculated to mislead. "The statute does not give a lien, but only a potential right of creating it." *Edmonds v. Tiernan*, (1892) 21 S.C.R. per Strong J., at p. 407.

## THE LIEN OF THE CONTRACTOR.

To entitle the contractor to a lien there must be something in the nature of direct dealing between the contractor and the person whose estate is sought to be charged. Mere knowledge of the owner that the work is being done or the materials are being furnished will not suffice to create a lien against his inter-



est. *Gearing v. Robinson*, (1900) 27 A.R. 364 and cases cited *post* under section 4(b).

#### THE LIENS OF THE SUB-CONTRACTOR AND LABORER.

Sometimes the lien created by a local statute subordinates the lien of the sub-contractor or laborer to the lien of the head contractor, but in Canada by the uniform policy of the various provincial statutes a lien is given to sub-contractors and laborers independent of the primary contractor. Even if he is employed by the contractor, the lien of a sub-contractor or laborer is not under any provincial statute in Canada by way of subrogation and does not depend upon the terms of the contract or the state of the account between his employer and the owner of the land, but grows out of the furnishing of material and labor and their use in the building. In a leading case in the United States (*Van Stone v. Stillwell*, (1891) 142 U.S., at p. 136), Lamar, J., in stating the opinion of the court said: "It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute." Substantial performance of his contract by the sub-contractor, unless waived or prevented by the owner or principal contractor, is a condition precedent to his right to payment, and consequently his right to lien. *Ringle v. Wallis Iron Works*, (1896) 149 N.Y. 439.

#### EXTENT OF LIEN.

Boyd, C., in delivering judgment in *King v. Alford*, (1885) 10 O.R. 647, said: "There is nothing in the scope of the Act as to liens to indicate that it was intended to be operative to a

greater extent than as giving a statutory lien issuing in process of execution, of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution." In another part of his judgment in this case he points out that a mechanic's lien is not analogous to a vendor's lien, and Mr. Justice Ferguson in the same case states fully the distinction between a mechanic's lien and a vendor's lien.

### WAIVER OF LIEN.

A lien upon realty may be waived as between the immediate parties by agreement in writing. See section 4, *post*. The cases cited under the chapter in this volume dealing with liens on personalty have practically no application where the subject matter is realty, the nature and terms of the statutory provisions respecting realty negating such application.

See sections 3, 4, 6 and 28 of the Ontario Act and cases cited thereunder.

The right to a lien is waived where the parties have submitted the matters to arbitration and the arbitrators have made an award (*N. Y. L. Co. v. Schneider*, 15 Daly, N.Y. 15), but it has been held otherwise where there is a revocation of the agreement to submit by the lien claimant. *Paulsen v. Manske*, 126 Ill. 72.

### ACTS WHICH DO NOT WAIVE LIEN.

A lien claimant does not waive his lien by bringing an action at law for his debt and attaching the real estate against which he is seeking to enforce his lien. *Angier v. Bay State Co.*, (1901) 178 Mass. 163. Where a contractor agreed to build a house for a price named, one-half to be paid when the shingles and clapboards were on, and the other half when the house was finished, it was held that this contract did not stipulate for a credit inconsistent with the enforcement of the lien and could not be considered as a waiver of it.

In a very recent case in Connecticut (*Halstead and Har-mount Co. v. Arick*, (1904) 76 Conn. 382), it was held that a waiver does not result, as a matter of law, merely from the fact that the owner, when ordering the lumber, agreed to give and afterwards did give the material man a mortgage on other land "as additional security." The question whether the mortgage was intended to be in lieu of a lien is a question of fact for the trial court.

A provision in a contract postponing the final payment until 32 days after the work was entirely completed, and requiring payment only on sufficient evidence that all claims upon the building for work or materials were discharged, is not inconsistent with the existence of a right on the part of the contractor to secure the payment of his dues by claiming a lien. *Poirier v. Desmond*, (1900) 177 Mass. 201.

#### ESTOPPEL.

Where the holder of a mechanics' lien stated at a sale that there was no incumbrance on the estate and advised a party to buy it, who, relying on the statement, became the purchaser, the holder cannot set up his lien. *Hinchley v. Greany*, (1875) 118 Mass. 595. See also cases cited at p. 497, vol. 20 Am. and Eng. Ency. of Law (2nd ed.).

A mechanics' lien can be enforced against the owner of a lot who knowingly suffers a verbal sale of it through an agent to a person and the erection of a building thereon by the purchaser pursuant to such sale. *West v. Pullen*, (1900) 88 Ill. App. 620.

W. & Co. having a contract to build an elevator, etc., for the defendants, purchased an engine and other machinery from plaintiffs on the terms that the ownership was not to pass until payment, which was to be cash on delivery, and that in case of default plaintiffs were to be at liberty to remove the machinery. Plaintiffs first took proceedings under the Mechanics' Lien Act to realize the amount of their claim, but abandoned them. In

the present suit the plaintiffs asked that defendants might be ordered to deliver up the machinery and to permit plaintiffs to remove it. Held that plaintiffs were entitled to relief and were not estopped by having commenced proceedings under the Mechanics' Lien Act, as they had not gone on to judgment. *Priestly v. Fernie*, 3 H. & C. 977, distinguished (the parties there having gone to judgment). *Vulcan Iron Co. v. Rapid City Co.*, (1894) 9 Man. 577 and 586. See also on the question of estoppel, *Sprague v. Brown*, (1901) 178 Mass. 220, referred to *post*, at p. 98. See also *Saunders v. Bennett*, (1893) 160 Mass. 48.

A mistaken statement that a mechanics' lien has been paid does not estop the lien claimant from subsequently enforcing it against one who bought the property in reliance on the statement, if it was made to him without any knowledge that he had any interest in the matter or any intention to buy the property. *Kirchman v. Standard Coal Co.*, (1901) 52 L.R.A. 318.

See notes under section 7, *post*, at p. 97, on the application of the principle of estoppel.

## CHAPTER III.

### CONSTRUCTION OF MECHANICS' LIEN ACTS.

There are conflicting decisions throughout the United States in respect to the construction of Mechanics' Lien Acts, some courts favoring the view that such a statute being declared to be remedial should be liberally construed, while other decisions uphold the rule that such liens being in derogation of the common law, the statutes creating them should be strictly construed. In Canada the courts will not extend the meaning or operation of such a statute by construction, in so far as the terms creating the right to a lien are concerned. The filing of the lien is such a simple and reasonable requirement which can be fulfilled in a plain and obvious way that a mechanic can have no just ground of complaint if this portion of the statute is strictly construed. In a case under the British Columbia Mechanics' Lien Act (*Edmonds v. Tiernan*, (1892) 21 S.C.R. 407), Strong, J., said: "It is quite clear that when a statute gives a privilege in favor of a creditor, the creditor must bring himself strictly within its terms, and there is nothing in the statute in question here which provides that if a lien has once been abandoned it is to be considered as being abandoned merely for a time. If we should hold that it was to be so considered we should be adding a clause to the Act."

In *Robock v. Peters*, (1900) 13 Man. 139, a case where the Manitoba Act was being construed, Killam, C.J., said: "But these liens are wholly of statutory creation, and in derogation of ordinary rights. They can be given only such effect as the statute clearly warrants. While the whole statute must be read together, and one clause may assist in the construction of another, I cannot find in the other clauses such an indication of an entire intention as should affect the natural interpretation



of the language in section 4, sub-section (2). That clause seems to me to be the one which deals specifically with the relative priority of liens and mortgages made after commencement of work or furnishing materials, and must govern upon that point."

In a British Columbia case (*Haggerty v. Grant*, (1895) 2 B.C.R. 176), Begbie, C.J., said: "The same statute which gives the inchoate right of lien, either for work or materials, declares that it shall absolutely cease unless an affidavit be filed within thirty-one days, stating the enumerated particulars, one of which is the address of the owner. That affidavit constitutes the lien (section 9 of 1888, section 8 of 1891), and in order to acquire a right of this very unusual nature, the statute must be strictly followed." At page 177 of the same report the Chief Justice further says: "These statutes do not confer ordinary rights. They must be followed and construed at least as strictly as the statutes regulating conditional bills of sale."

In a subsequent case (*Smith v. McIntosh*, (1896) 3 B.C.R. 26), Crease, J., at p. 28, in applying the principle of construction just quoted, referred to the case of *Harding v. Knowlsen*, 17 U.C.Q.B. 564 (which was a case of a conditional bill of sale), as an illustration of the extreme rigidity with which such Acts are construed. The affidavit which was made in that case closely followed the direction of the statute in all other respects but this, that the word "creditor" was inserted instead of "creditors." In commenting on this defect, Crease, J., said: "I dare say it was a mere mistake of the person who wrote the affidavit, but such mistakes cannot be allowed to have the effect of frittering away the provisions of an Act of Parliament."

In another case under the B. C. Mechanics' Lien Act, *Wake v. C. P. L. Co.*, (1901) 8 B.C.R., at p. 360, Martin, J., says: "However unfortunate it is that the laborers have lost or will lose most of their wages, it would be still more unfortunate if, when they pursue a statutory remedy which imposes a heavy penalty upon persons who do not even employ them, the statute should be strained to add to the existing burden of responsibil-



ity already borne by such third persons.' See also observations of Irving, J., in *Leroy v. Smith*, (1900) 8 B.C.R., at p. 298, and of MacLennan, J.A., in *Gearing v. Robinson*, (1900) 27 A.R. 364.

In a recent Ontario case, *Webb v. Gage*, (1902) 1 O.W.R. 327, Meredith, C.J., said: "In some of the American States a construction more favorable to the contractor has been given to the Mechanics' Lien Acts, the provisions of which were somewhat like those of our Act, which are in question here, though not identical with them, but we are, of course, bound to follow the decisions of the Court of Appeal of this Province in preference to those decisions." In the Province of Quebec, where, although there is no Mechanics' Lien Act, provisions of the civil law, similar in many respects, exist, it has been held that a strict compliance with such provisions is necessary to create a lien. *La Banque d'Hochelaga v. Stevenson*, 9 Quebec Q.B. 282; (1900) A.C. 600.

The only Canadian judgment which is apparently not in complete harmony with the principle of applying strict construction to the sections creating the lien is a judgment by Mr. Justice Ferguson in *Makins v. Robinson*, (1884) 6 O.R. 1. It was contended in that case that the registration of the lien was not good because the name of the person who was the owner at the time was not mentioned in it, the former owner having without the knowledge of the claimant sold and conveyed the property before the completion of the work. Ferguson, J., after quoting from the decision in the case of *Jones v. Shawhan*, (1842) 4 Watts & Serg., at p. 262, and stating that the statute under which that decision was given was somewhat different from the Ontario statute he was then construing, said: "Yet I am of opinion that the reasoning of the case to which I have referred applies, especially when I look at the date of the conveyance to Pousette and the allegation of the plaintiff that he did not know anything about it, and I am of opinion that this alleged defect is not fatal, although it has been said that the statute relative

to mechanics' liens being in derogation of the common law, should be strictly complied with." But in the Pennsylvania case quoted by Ferguson, J., it is important to note that Gibson, C.J., stated in his judgment that the Pennsylvania Statute "expressly requires no more than the name of the reputed owner, and it might be sufficient to file it (i.e., the claim) against the past or present one."

In 1903 the Supreme Court of Michigan, in a case (*Waters v. Johnson*, 96 N.W. 504) which involved the construction of a statute similar in its terms to that construed in *Jones v. Strawn*, *supra*, dissented from the construction given in that case, and held that a lien claim which named a person who had conveyed the property before the filing of the claim was insufficient, and that the claimant could only be relieved from such mistake on proof of facts showing that the error was justly chargeable to the grantee of the property so as to estop him from taking advantage of the error.

While in the various Provinces in Canada having Mechanics' Lien Acts a strict construction would be given by the Courts to the sections creating the right to a lien, which sections would not be extended beyond the plain sense of their words, the same rule would probably not be generally followed when other sections of the Act, dealing with the enforcement of the lien, are the subject of construction. There is, indeed, no rule of construction applicable uniformly to every provision of such an Act. So far as the provisions of the statute which create the right to a lien are concerned, a rule of construction as stated by an eminent authority might be appropriately invoked: "Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to strict construction." (Maxwell, 3rd ed. 399.) But, when the other provisions of a Mechanics' Lien Act, dealing with the enforcement of the lien are the subject of construction, a tendency to give these sections a broad and benign interpretation would probably be shown by the courts in the various Provinces in Canada, and

there would be a disposition to follow the advice of Lord Mansfield, given in connection with another branch of the law, but quoted approvingly by a Pennsylvania court in respect to the construction of Mechanics' Lien Acts, to "avoid entangling the right in a net of form." At least one legal writer favors this view, that in respect to the question whether a lien attaches a strict construction should apply, but that after the lien has once attached, a liberal construction should be given. Jones, Liens, ss. 1554-1556.

In the case of *Bickerton v. Dakin*, (1891) 20 O.R., at p. 702, Meredith, J., stated a canon of construction which will probably be followed in the various courts in Canada. Referring to the mechanics' lien laws, he said: "These essentially remedial Acts are to be given such fair, large and liberal construction and interpretation as will best ensure the attainment of those objects. Effect should not be given to technical objections founded upon matters which in no way have prejudiced or could prejudice any one. . . . It was never intended that the benefits of the Acts should be frittered away by requiring the skill of a special pleader to secure them."

In the case in question the owner had purchased with notice of all the facts and invoked purely technical grounds in seeking to have the property declared to be unaffected by a claim of lien.

See also observations of Boyd, C., in *Crerar v. C. P. R. Co.*, (1903) 5 O.L.R. 383; 2 C.L.R. 107. In *Craig v. Cromwell*, (1900) 27 A.R., at p. 587, Osler, J.A., said, in referring to the question of the sufficiency of the notice in writing required by section 11, sub-section 2: "It may be that if the notice were to be read as pleadings, civil and criminal, were read fifty years ago, fatal defects might be picked out in it. But it is not intended to be the subject of subtle criticisms and trifling objections."

In a Manitoba case, *Robock v. Peters*, (1900) 13 Man. 139), Killam, C.J., after quoting section 17 of the Manitoba Me-

chanics' Lien Act, said: "This latter clause appears divisible into two parts. First, only substantial compliance with sections 15 and 16 is required, and, secondly, no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some party is prejudiced, provided there is registration of a claim. I think that the onus on the question of prejudice is upon the party objecting to the registered claim. The defect is not to invalidate the lien, unless in the opinion of the judge there is prejudice to some one. That is, the judge must positively form the opinion, for which purpose he must have some evidence, either direct or arising out of the circumstances and the nature of the defect. In the present case there is nothing to suggest that any of the parties interested saw the registered statement of claim or knew its contents or was in any way affected by the error."

There are no other cases in Canada which can be cited as illustrating the application of different rules of construction to different branches of the Act. In a leading case, however, in Massachusetts (*Trask v. Searle*, (1876) 121 Mass. 229), Lord, J., said: "Although when a lien attaches, the provisions of law upon the subject being remedial, a liberal construction will be put upon the statute for the purpose of accomplishing its objects, yet this applies only to liens which have attached. Upon the question whether a lien attaches, a different rule of construction obtains. Liens are in derogation of the common law; they may create an interest in land by parol, and that interest may be a secret interest. The court is not authorized to extend the law beyond the causes specifically provided for. It cannot say that the statute by implication includes labor not within its terms."

If the filing does not take place within the time specified, the lien is absolutely dissolved, notwithstanding any agreement between the parties to preserve it. *Hilliard v. Allen*, (1849) 4 Cush. 532, 536. The filing of a claim in conformity with the provisions of the mechanics' lien law is a condition precedent



to the enforcement of the lien. The filing of the claim is not merely for the protection of creditors, incumbrancers and purchasers, as it is required to be filed even when the sole party defendant in interest is the owner of the land. *Christian v. Allee*, (1902) 104 Ill. App. 177.

The rule in New York has been stated to be that the Act should not be strictly construed except as to the provisions by which the property of a third person may be incumbered. *Hubbell v. Schreyer*, 14 Abb. Pr. (N.S.) 284. In a recent case in New York (*Mahley v. The German Bank*, (1903) 174 N.Y. App. 499) the question of construction of the New York Lien Act was discussed. That Act (see Appendix "A") requires the notice of lien to state when the first item of work was done, and the notice of lien in that case failed to make any such statement, although it complied with the other provisions of the statute. Section 22 of that Act expressly declares that the statute is to be construed liberally. Cullen, J., in delivering the judgment of the court, said: "But under the most liberal rule of construction we cannot find anything in the notice that even attempts to state when the first item of work was done, or anything from which that time might be inferred. It is true that the particular advantage or object of requiring this fact to be stated is not readily apparent, but the statute has expressly required it. Errors in the notice may be disregarded, and it is not necessary that the precise verbiage of the law should be followed. But the provision of the statute that the law shall be construed liberally does not authorize the courts to entirely dispense with what the statute says the notice shall contain. We are, therefore, constrained to hold the notice of lien insufficient."

In the Interpretation Acts of various Provinces in Canada there is a provision (R.S.O. ch. 1, sec. 41) which enacts that every chapter of the Revised Statutes shall be deemed remedial and shall be construed liberally, unless such construction is inconsistent with the intent and object of the particular Act. But this is a general rule of construction and is necessarily subordinate to particular canons.



Another recent New York case (*McDonald v. Mayor, etc., of New York*, (1902) 170 N.Y. App. 409) serves to illustrate the liberal construction of the New York Statute respecting mechanics' liens. The chapter under which the plaintiff undertook to acquire a lien provided that "at any time before the whole work to be performed by the contractor for the city is completed or accepted by the city, and within thirty days after the same is so completed or accepted, any claimant may file notices stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, etc." The verification was by an agent of the claimant, stating "that he is the agent of the claimant . . . mentioned in the foregoing claim, and that the statements therein contained are true to his own knowledge or information and belief." Haight, J., said: "It appears to us that this statute should receive a liberal construction. Indeed, the general lien law of the State provides that it shall be construed liberally, etc. A very large proportion of the business of the country is carried on by agents, whose principals may have but a slight knowledge of the details of the work and who may be absent in other parts of the world. Agents are generally recognized as possessing the powers of their principals in the transaction of their business and in the preservation of their properties and rights. In construing the Act in question we think the act of the agent should be deemed to be that of the principal, and that it was so contemplated by the legislature."

In a recent case in Connecticut (*Barlow Bros. Co. v. Gaffney*, (1903) 76 Conn. 107) the court said: "The right to a lien is given by statute and courts are powerless to change the conditions upon which it depends."

In Pennsylvania it has been held that upon doubtful questions of construction the argument from inconvenience has great force and that the statute should have a fair and liberal construction in advancement of the remedy. *Dame's Appeal*, 62 Pa. St. 420.

The most recent declaration of the Massachusetts Supreme

Court on this question of construction is to be found in the case of *General Fire Extinguisher Co. v. Chaplin*, (1903) 183 Mass. 375. The facts were that under an entire contract to construct and install in the respondent's buildings a fire extinguishing system of a specified kind for a stated price, a sworn statement was filed in the Registry of Deeds while the work was going on and about ten days before it was completed. It was held that such a statement filed before the work was done or the debt was due did not fulfil the requirements of the Act. Under section 1 of the Act in question (see Appendix B) it is only "a person to whom a debt is due" who can file a statement and establish a lien. By section 6 he is authorized to file his statement within thirty days after he ceased to labor on or furnish labor or materials for the building or structure. Section 7 relieves the claimant from any injurious effect of an inaccuracy in stating "the amount due for labor or materials" unless he has "wilfully and knowingly claimed more than is due to him."

Knowlton, C.J., said: "We are of opinion that these various provisions of the statute do not authorize the filing of a statement except where work and labor has been done under such circumstances as to create a debt which is due, and which is payable either then or at some future time. This is the construction which has been put upon similar statutes by the courts. The cases which seem to hold differently are all, or nearly all, under statutes which require the filing within a stated time after an event, the happening of which has no important relation to any of the facts to be embodied in the certificate or statement."

The judgment concludes by using precisely the same words which were used in a Massachusetts case (*Gale v. Blaikie*, 129 Mass. 206) more than twenty years previously: "A lien of this kind can be preserved and enforced only by a strict compliance with the requirements of the statute. There are no equities to be invoked in aid of it."

In a case which came before the Supreme Court of the United States in 1897 (*Springer Land Association v. Ford*, 168

U.S. 513), Fuller, C.J., in delivering the judgment of the court, said: "Although mechanics' liens are the creation of statute, the legislation, being remedial, should be so construed as to effectuate its object."

The reason stated by the United States Circuit Court of Appeals, Missouri, for a liberal construction of statutes which gave liens to laborers and material-men is that such men cannot recover back their labor or material, and the improvements on which they are placed are ordinarily enhanced by their value. *Hooven v. Featherstone*, (1901) 49 C.C.A. 229.

The view expressed by the Supreme Court of Illinois on this question is that the right to a mechanics' lien is a cumulative remedy existing by statute in derogation of the common law, and statutes granting such right must be strictly construed. *Harvey and Mose Plumbing Co. v. Wallace*, (1901) 99 Ill. App. 212, affirmed; *M. Pugh Co. v. Wallace*, 198 Ill. 422.

In Maine the courts favor a liberal construction of the statute. *Shaw v. Young*, 87 Me. 271; *Westcott v. Bunker*, 83 Me. 499; *Durling v. Gould*, 83 Me. 134.

An observation made by Chancellor Boyd in the case of *Graham v. Williams*, (1885) 8 O.R. 478, points to an additional principle which might be adopted in the construction of Mechanics' Lien Acts. That eminent judge said: "If you give a very latitudinarian interpretation to the definition of 'owner,' it is possible to read such a case as this into the Act, but I am against giving such a meaning to the words when the result is to charge one man's land for another man's debt." In a later case (*Gearing v. Robinson*, (1900) 27 A.R. 364), MacLennan, J.A., adopts a similar attitude in construing the statute, and says: "This may seem a very strict and literal construction of the Act, but, if it is, as I think it is, the plain meaning of the language of the legislature, we must so construe it, and I do not think we ought to change *and* into *or*, or strain the language in order to charge one man's land with another man's debt."

It is but just to require that an intention to create such a

charge should be plainly and unmistakeably expressed in the statute, in language which excludes any other interpretation, but after the lien has actually attached the better opinion seems to favor the view that the other provisions of the statute should receive a liberal construction.

Boisot, after referring to the difficulty of harmonizing the conflicting decisions in various States, and pointing out the distinction between the "remedial" sections of a Mechanics' Lien Act and the other portions, propounds a rule which is in line with the observation of Boyd, C.: "It follows, then, that those provisions of the Mechanics' Lien Statutes which make a man's property liable for his debts are remedial, and should be liberally construed; while those provisions that make his property liable in a case where he is not personally liable, create a new right, in derogation of the common law, and should be strictly construed." Boisot, S. 36 B.

### RETROSPECTIVE AND REPEALING.

Mechanics' lien laws are not construed to have any retrospective effect unless such construction is clearly and unmistakeably required by the words of the Act. *French v. Hussey*, (1893) 159 Mass. 206; *Pierce v. Cabot*, (1893) 159 Mass. 202; *Benton v. Wickwire*, (1873) 54 N.Y. 229.

Where a later Act does not expressly repeal the former one, and they are not so inconsistent that they cannot stand together, the two Acts are construed together as if parts of a single statute. *Gilson v. Emery*, (1858) 11 Gray (Mass.) 430; *Collins v. Drew*, (1876) 67 N.Y. 149.

The Interpretation Acts of the various Provinces often have an important bearing on the construction of the Mechanics' Lien Acts. An illustration of the application of the Interpretation Act is afforded by the case of *Walker v. Walton*, 1 A.R. 579. The plaintiff registered a lien under the Mechanics' Lien Act of 1873, on the 14th August, 1874, for the price of machin-

ery furnished on the 12th of the same month. The price was payable in instalments, the last of which fell due on the 4th of May, 1875. A bill to enforce the lien was filed on the 7th of July, 1875, being within the 90 days from the expiry of the period of credit prescribed by section 4 of the Mechanics' Lien Act of 1873. Section 14 of the Mechanics' Lien Act of 1874, which came into force on the 21st December, 1875, enacted that "every lien shall absolutely cease to exist at the expiration of thirty days after the work shall have been completed or the machinery furnished, unless in the meantime proceedings shall have been taken to realize the claim under this Act," and section 20 repealed all Acts inconsistent therewith. Held, reversing the decree in the preceding case, that even if the Act of 1874 repealed the Act of 1873, the plaintiff's lien was saved by sub-section 4 of section 7 of the Interpretation Act, which provided that the "repeal of an Act at any time shall not affect any act done or any right or right of action, existing, accruing, accrued or established . . . before the time when such repeal shall take effect." *Walker v. Walton*, (1877) 1 A.R. 579.

The repeal of a mechanics' lien law during the progress of the work for which a lien is claimed does not cut off the lien claimant's right for the work already done, where the repealing statute re-enacts and continues the lien law, with some changes in matters of procedure only. *Bear Lake & R. W. W. & I. Co. v. Garland*, (1896) 164 U.S. 1.

A Mechanics' Lien Act by one section repealed all previous Mechanics' Lien Acts, and as it enacted no lien for materials, no such lien existed. *Albion I. Works v. A. O. U. W.*, (1895) 5 B.C.R. 122, note.



## CHAPTER IV.

### MECHANICS' LIENS UPON PERSONALTY.

#### *Their Nature and Characteristics.*

There are two species of lien known to the common law, namely, Particular Liens and General Liens.

Particular liens exist where persons have the right to retain goods in respect to labor or money expended upon them, and these liens are favored in law. *Houghton v. Matthews*, (1803) 3 B. & P. 485. "As between debtor and creditor, the doctrine of lien is so equitable that it cannot be favored too much." Best, C.J., in *Jacobs v. Latour*, (1828) 5 Bing. 132. All such specific liens being consistent with the principle of natural equity are favored by the law, which is construed liberally in such cases. *Scarfe v. Morgan*, (1838) 4 M. & W. 283, *per Parke*, B.

General liens attach to property to secure a general balance of account due from the owner to the possessor, whether in respect to that property or not. *Anglo-Italian Bank v. Davies*, L.R. 9 Ch. D., at p. 289. General liens are founded on custom only, and are therefore to be taken strictly. *Houghton v. Matthews*, (1803) 3 B. & P. 494; *Bock v. Gorrisen*, (1860) 2 De G. F. & J., at p. 443. The liens of bankers, factors, attorneys and wharfingers are general liens.

By the general custom of trade an artisan may have a lien for his general balance (*Saville v. Barchard*, (1801) 4 Esp. 53), but ordinarily a mechanic has no lien to secure a general balance due him (*Cumpston v. Haigh*, (1836) 2 Bing. N.C. 449; *Lilley v. Barnsley*, (1844) 1 C. & K. 344), particularly where, as in Canada, there would usually be no custom of trade creating a general lien for any class of artisans.

It is one of the characteristics of common law liens such as a mechanics' lien on a chattel as distinguished from liens created by contract or by statute, that the former over-ride all other rights in the property to which they attach and the latter are subordinate to all prior existing rights therein. *White v. Smith*, (1882) 44 N.J.L. 105.

#### EXTENT OF MECHANICS' LIEN.

A mechanics' lien is a particular or specific lien which confers upon a mechanic who has bestowed labor, skill or expense upon or in respect of the chattel of another, the right to retain the chattel for his reasonable charges until they are satisfied. The work done must be authorized expressly or impliedly by the owner of the chattel. *Bleaden v. Hancock*, (1829) 4 C. & P. 152; *Hammonds v. Barclay*, (1802) 2 East 235; *Chase v. Westmore*, (1816) 5 M. & S. 180; *Bevan v. Waters*, Moo. and Malk. 236; *Franklin v. Hosier*, (1821) 4 B. & Ald. 341; *Busfield v. Wheeler*, (1867) 14 Allen (Mass.) 139. As to authority implied from circumstances, see *White v. Smith*, (1882) 44 N.J.L. 105.

This lien extends to all labor and materials expended upon the chattel, and to all the goods included in the contract, although delivered to the mechanic in different parcels and at different times, so long as there is an entire contract. *Chase v. Westmore*, (1816) 5 M. & S. 180; *Blake v. Nicholson*, (1814) 3 M. & S. 167; *Saunderson v. Bell*, (1834) 2 Cr. & M. 304; *Morgan v. Congdon*, (1851) 4 N.Y. 552. This principle would not apply where there are distinct contracts, (*Marks v. Lahee*, (1837) 3 Bing. N.C. 408), but where there is an entire contract for a certain sum to make or repair several articles, the lien rests on one or two articles in the possession of the lien claimant, not only for their proportionate part of repairing the whole, but for the amount due for labor on all the articles. *Hensel v. Noble*, 95 Penn. St. 345; *Blake v. Nicholson*, (1814) 3 M. & S. 167.

This lien has been extended so as to include all money ex-

pendent in the preparation of the means of doing the work. *Lummus on Liens*, S. 37; *Conrow v. Little*, (1889) 115 N.Y. 387, 393; *Busfield v. Wheeler*, (1867) 14 Allen (Mass.) 139. In *Conrow v. Little*, *supra*, the lien claimants were a printing firm and had only executed a small portion of work upon a large quantity of paper supplied them, when through the owner's default the completion of the work was prevented. Danforth, J., in delivering the judgment of the court, said, in referring to the lien of the claimants: "It attached the moment the paper came into the possession of the defendants for the purpose of having work done upon it, and remains good until discharged by payment, not only for labor literally expended upon the paper itself, as by printing, but for any act done or labor performed or money expended in the preparation of instrumentalities by which that labor was to be performed, as types, cuts, illustrations, electrotypes and other things of like nature and object." But see judgment of Harrison, C. J. in *Gurney v. MacKay*, (1875) 37 U.C. Q.B. at p. 336.

The lien extends only to the principal chattels placed in the mechanic's hands to be worked up and not to the accessorial materials which may have been furnished by the employer and left upon the premises of the mechanic unused. Addison on Contracts, 10th ed. 820; *Cumpston v. Haigh*, (1836) 2 Sc. 684, 5 L.J. C.P. 99.

The lien law leaves the question of trade fixtures where it finds it. *Coddington v. Dry Dock Co.*, (1863) 31 N.J.L. 477. "Trade fixtures" are personalty and the security of the mechanic who constructs them is in the enforcement of his lien upon the chattel. *Carroll v. Shooting the Chutes Co.*, (1900) 85 Mo. App. 563.

### ENFORCEMENT OF LIEN.

The Mechanics' Lien Acts existing in various provinces in Canada contain provisions which deal with liens on personalty and are intended to give an effectual remedy for the enforce-

ment of the lien. These provisions do not create the lien, as the lien always existed, not only under the civil law, (*Belleau v. Pitou*, 13 Quebec L.R. 337), but also at common law. *Chase v. Westmore*, (1816) 5 M. & S. 180; *Ex. p. Willoughby*, (1881) L.R. 16 Ch. D. 604. This lien attaches for the whole amount of indebtedness to any part of the goods remaining in possession of the lienor. *Blake v. Nicholson*, (1814) 3 M. & S. 167.

The Mechanics' Lien Acts give the additional right of sale to the lien-holder. Under the common law the mechanic already had the right to retain the chattel in his possession until his claim was satisfied, but there was no efficient method of enforcing the lien, as he did not have the right to sell the chattel there being in that respect a distinction between a mechanics' lien and an express pawn or pledge of goods by the owner, as collateral security for a loan of money, as the creditor might sell the pledge in the latter case. *Mulliner v. Florence*, (1878) L.R., 3 Q.B.D. 484; *Donald v. Suckling*, (1866) L.R. 1 Q.B. at p. 612; *Doane v. Russell*, (1855) 3 Gray (Mass.) 382; *Folsom v. Barrett*, (1902) 180 Mass. 439.

#### ESSENTIALS OF THE LIEN.

To establish the lien at common law there must be,—

(a) *A debt arising by implication of law out of a contract between the mechanic and the owner of the chattel*, (*Hiscox v. Greenwood*, (1801) 4 Esp. 174), *by the performance of which the mechanic bestows labor, skill or expense upon the article.* *Sawyer v. Longford*, (1848) 2 C. & K. 697; *Chase v. Westmore*, (1816) 5 M. & S. 180; *Belleau v. Pitou*, 13 Quebec L.R. 337; *Marks v. Lahee*, (1837) 3 Bing N.C. 408; *Jackson v. Cummins*, (1839) 5 M. & W. 342; *Scarfe v. Morgan*, (1838) 4 M. & W. 270. Several of the above cases seem to hold, and some of the legal writers on this subject apparently conclude, that it is essential to the maintenance of the lien that the labor and skill bestowed on the chattel should actually add value to it. But such a propo-



sition, perhaps, should not be accepted as absolute and inflexible. An owner might employ a mechanic to alter a chattel, although the alteration required would not add value to the article and might in fact lessen its value except in the opinion of the owner. But if the work is performed according to an agreement with the owner, the lien claimant should not be deprived of a lien because in carrying out the instructions of the owner and as a result of doing so the article was perhaps rendered less valuable than before. The rule therefore should, perhaps, be stated in some such form as that the labor and skill of the mechanic must impart additional value to the chattel or be intended by the owner to have that effect. Section 51, *post*, which empowers the mechanic to sell the chattel recognizes his right to a lien where his work has been done on the thing "for the purpose of imparting an additional value to it."

The work on the chattel must be expressly or impliedly authorized by the owner of the chattel. *Hollis v. Claridge*, (1813) 4 Taunt. 807; *Castellain v. Thompson*, (1862) 13 C.B.N.S. 105; 32 L.J. C.P. 79; *Small v. Robinson*, (1879) 69 Me. 425; 31 Am. Rep. 299. While the work on the chattel must be done under contract the authority of the owner to do the work will be implied from circumstances which would not raise an implication of a contract by the owner to pay the charges to be enforced by a suit against him, as where a wife allowed her husband to use her wagon and he had necessary repairs made, it was held that the mechanic had a lien therefor. *White v. Smith*, (1882) 44 N.J. Law, 105.

(b) *Continuous possession, either actual or constructive, in the lien claimant, is essential to the existence of the lien.* *Leg v. Evans*, (1840) 6 M. & W. 36; *Taylor v. Robinson*, (1818) 2 Moore 730; *Ex. p. Willoughby*, (1881) L.R. 16 Ch. D. 604; *McMillan v. Byers*, (1886) 3 Man. 861. This possession need not be absolutely exclusive but must be uninterrupted, as even a temporary, voluntary relinquishment and subsequent resumption of it is an abandonment of the lien. *Forth v. Simpson*,



(1849) 13 Ad. & E. (N.S.) 680; *Hartley v. Hitchcock*, (1816) 1 Stark. 408; *Jackson v. Cummins*, (1839) 5 M. & W. 342; *Dixon v. Dalby*, (1852) 11 U.C.Q.B. 79; *Rielly v. McIlmurray*, (1898) 29 O.R. 167; *McNeil v. Keleher*, (1865) 15 C.P. 470; *Milburn v. Milburn*, (1848) 4 U.C.Q.B. 179; *Webber v. Cogswell*, 2 R. & C. 47; 2 S.C.R. 15. The last two cases are sometimes cited as inconsistent with the proposition that continuous possession is essential to the maintenance of the lien but a careful examination of the facts will show that they are not in conflict with this doctrine, but that in each case the chattels were during all the time in the constructive possession of the lien claimant. In the latter case the mechanic at Halifax sent the chattel to Boston to have it repaired and it was held that the Halifax mechanic had a lien for the charge made by the Boston mechanic. Unless there is a stipulation or implication to the contrary in the contract the lien claimant is not obliged to do the work himself, or to have it done upon his own premises, but may employ some one outside his premises and in such a case, where the outside mechanic would be a sub-contractor the outside mechanic would have no lien, there being no contractual relation between him and the owner and no implied consent to such a lien, (*Hollingsworth v. Dow*, (1837) 19 Pick. 228) and his possession being really in the right of his own employer. See *Whittle v. Phelps*, (1902) 181 Mass. 317.

(c) *The possession must be lawful.* Where one wrongfully obtains possession of chattels and delivers them to a third party, who bestows money, skill or materials thereon the latter would have no lien therefor as against the rightful owner, (*Hartop v. Hoare*, (1743) 3 Atk. 43), and even where a person lawfully obtains possession of a chattel, as by gratuitous loan or bailment, and delivers the chattel to a third person who repairs it the latter has no lien for the repairs. *McDonald v. Stirskey*, (1879) 3 R. & C. 520.

An involuntary surrender of possession does not defeat the lien, (*Wilson v. Kymer*, 1 M. & S. 157; *Lane v. Old Colony R.*

*R. Co.*, 14 Gray, (Mass.) 148; *Lynch v. Tibbits*, (1857) 24 Barb. N.Y. 51), and on the other hand regaining possession without the consent of the owner, after voluntarily parting with the possession, will not revive the lien. *Hartley v. Hitchcock*, (1816) 1 Stark. 408; *Howes v. Ball*, (1827) 7 B. & C. 481.

Some of the earlier English cases and a few cases decided in the United States are sometimes cited by legal writers to sustain the proposition that possession in order to confer the right to a lien must be exclusive and unconditional. Such a proposition does not seem to be clearly sustained by the governing decisions on this question.

It is difficult to state what constitutes sufficient possession to secure the right to lien, but while exclusive possession is not strictly essential there must be such actual control and possession in the lien claimant as would be reasonable under the special circumstances of the case. This question of what constitutes sufficient possession to give the right of lien can best be answered by a comparison of two cases,—*King v. Indian Orchard Co.*, (1853) 11 Cush. (Mass.) 231, and *Roberts v. the Bank of Toronto*, (1894) 25 O.R. 194; 21 A.R. 629. In the former case it was decided that a manufacturer of bricks burnt on the land of another, but of which the manufacturer has no lease and no other interest than the right to enter and make the bricks, has no such possession of the bricks as to give him a lien thereon for his labor. In that case the court (*per* Bigelow J.) said: “Upon the undisputed facts in this case it appears to us that the plaintiff fails to show any such possession of the property in question as will support the lien which he sets up in order to maintain this action. In the first place he shows no right or interest in himself either as owner, lessee, or tenant of the possession of the yard in which the bricks were made and burned.

Upon these facts it is manifest that the plaintiff never had any exclusive and unconditional possession of the property. It was, at most, only a mixed possession with Stearns or rather a

license to the plaintiff to enter upon and use the yard of Stearns for the purpose of making and burning the brick. It is entirely clear that such a restricted and limited possession is insufficient to support a lien. It amounts to nothing more than the ordinary transaction of work done by one person in the manufacture or repair of articles for another upon the premises of the latter. The workman in such a case has to a certain extent possession of the property upon which his labor and services are expended but it is a qualified and mixed possession which can form no valid basis for a lien."

It is apparent that in this case the claimant failed to make out his own actual possession, and, moreover, that as an employee he could have no lien upon property of his employer. *State v. Goll*, (1867) 32 N.J.L. 285.

In the case of *Roberts v. Bank of Toronto*, *supra*, the plaintiff was employed to manufacture bricks for another in a brick-yard belonging to the latter, of which however the plaintiff held possession for the purpose of his contract, and remained and was in possession of the bricks at the time of their seizure by the sheriff under an execution against the owner of the brick-yard, who immediately after such seizure made an assignment for the benefit of creditors. It was held that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of the chattel mortgagee, though his mortgage covered brick in course of manufacture during its continuance.

On appeal it was contended that exclusive possession must be shown. The judgment however was confirmed and Haggerty, C.J.O. in the course of his judgment said:—"The possession necessary to entitle him to his common law lien must be such a reasonable, clear and actual possession as the nature of the case will admit."

An examination of two other cases will throw further light on the question of sufficiency of possession. In *Shaw v. Kaler*, (1871) 106 Mass. 448 it was held that a mechanic constructing

articles of furniture, under a contract by which his employer furnished the materials and bench room, could maintain an action for the conversion of the articles against one who took them from his possession claiming under an alleged mortgage from the employer, of the existence of which there was no evidence. In this case the crucial fact was established that the articles were retained in the actual possession of the mechanic in the employer's workshop. In *McLachlan v. Kennedy*, (1889) 21 N.S.R. 271, defendant wrote to plaintiff proposing an arrangement for quarrying and burning lime on plaintiff's land. Receiving no reply, he entered and burnt lime. The plaintiff afterwards ratified defendant's action and agreed to buy all the lime he burned and to supply the barrels. Plaintiff having refused to accept a lot of lime on the ground that it was not delivered within the time agreed on, the defendant shipped it to another party and plaintiff then brought action for the conversion of his property. Held that the action could not be maintained, the defendant's lien on the lime being undischarged.

In a recent case in Ontario, (*Hackett v. Coghill* (1903) Canadian Annual Digest, 208) Boyd C. said: "Later cases show explicitly that one necessary ingredient of lien is that the person claiming it should have full possession, meaning thereby that the claimant must have exclusive and continuous possession, and if the things are moved from the place of repair it must be to a place where absolute and entire dominion over them can be retained, a thing which can rarely be done." In support of this proposition some English cases are cited by this eminent judge and the case of *Somes v. British Empire Shipping Co.*, (1860) 8 H.L.C. 338, is distinguished. The facts in *Hackett v. Coghill* are not stated in the only report of the case which has been published. The facts as stated by the judge were as follows: "The plaintiff's claim is in respect of repairs done upon their vessels when they were hauled out upon his ways in the harbor at Wiarton. After the work was done the vessels were respec-



tively restored to the water and taken first to the dock belonging to Kastener and afterwards to the old dock erected by the town and which was in common and public use even after the erection of a new dock by the town about two years ago. While lying at the old dock the plaintiff put lock and chain upon the dredge and notified the owners, but before this he says that he had tied up the vessels at this dock and claimed to be in possession of them. The evidence shows that the plaintiff had permission to use Kastener's dock from the owner, and the old dock from the town authorities by verbal license for the purpose of his business in repairing vessels. The legal possession of the water lots on which the mooring existed at the time of the dispute as to possession which is now being litigated was vested in the Crown. The town authorities assert that the Crown would not deal with these water lots in any manner at variance with the recommendation of the town and in that attitude they granted permission some years ago to the plaintiff to use the locality as he has done. It is further in evidence that the owners had a person in possession of the dredge for the purpose of looking after it and keeping the machinery in proper order and he was on the boat at the time it was chained up by the plaintiff." Upon this state of facts it was impossible to support the claim of the plaintiff to a lien and the decision against the plaintiff cannot be questioned. The general statement of law however in the case, as reported, that a claimant must have exclusive possession seems at variance with some English judgments and at least one Canadian decision.

In one English case (*Crowfoot v. London Dock Co.*, (1834) 2 Cr. & M. 630), which is not cited in this Ontario case but, like it, was in connection with the repair of a ship, Parke, B. said: (at p. 655). "It is impossible to lay down any precise rule as to the sort of possession which is necessary in order to give validity to the lien. Each case must depend a good deal upon its own circumstances, and here the company had possession so far as the nature of the transaction would admit. Any more



exclusive possession on their part would have defeated the whole object of the advances which it was the purpose of the lien to secure. It would be going too far to say that the law rendered such exclusive possession necessary; and the case which has been cited (*Manton v. Moore*, 7 T.R. 67), though not exactly on the same subject, is nevertheless fairly relied upon as showing that the law does not require it. Though Streather has been permitted to use the engines and materials for a particular purpose they remained on the defendant's premises and under their control." *Hackett v. Coghill* also omits any reference to the case of *Roberts v. Bank of Toronto*, *supra*, where the Ontario Court on appeal did not uphold the contention that possession must be exclusive.

If possession is parted with the lien is gone in respect to third persons, although it was stipulated between the parties that the lien should continue notwithstanding the removal of the property. *McFarland v. Wheeler*, 26 Wend. N.Y. 467; *Oakes v. Moore*, (1844) 24 Me. 214, 41 Am. Dec. 379.

(d) *The work must be work of skill.* The principle of a common law lien is not applied to every kind of labor done on a chattel but extends only to skilled workmen exercising a trade or art. It would not apply to an ordinary laborer for doing such work as cutting wood, (*McMillan v. Byers*, (1886) 3 Man. 361), nor to an employé of a farmer in respect to a crop which the employé has harvested. *McDearmid v. Foster*, 12 Pac. Rep. 813. In ordinary cases the workman may accomplish the work through the medium of inferior agents and workmen but if the work is a work of art and genius and the contract is founded upon the personal talent of the artist, he impliedly undertakes to perform the work himself and may not entrust it to one less skilful. Addison on Contracts, 10 ed., p. 820; *Robson v. Drummond*, (1831) 2 B. & Ald. 308; *British Wagon Co. v. Lea*, (1880) 5 Q.B.D. 149; 49 L.J.Q.B. 321.

To maintain a lien a mechanic must bring himself within all the foregoing equally essential conditions.

## WAIVER AND LOSS OF LIEN.

A lien does not exist where the contract between the parties or the circumstances are inconsistent with the notion that one was intended. *Ritchie v. Grundy*, (1891) 7 Man. 532. Conduct inconsistent with the existence or continuance of a lien will constitute a waiver of it. "It is neither a *jus in re* nor *jus ad rem* and it may be waived by any act or agreement between the parties by which the right is given up." *Dempsey v. Carson*, (1862) 11 U.C.C.P. 462 *per* Draper C. J. Thus the lien will be waived by an agreement relating to the mode or time of payment, inconsistent with the right of lien (*Crawshay v. Homfray*, 4 B. & Ald. 50); *Fisher v. Smith*, (1878) 4 App. Cas. at p. 12; *Rollins v. Bowman Cycle Co.*, (1904) 89 N.Y.S. 289, 96 App. Div. 365); by claiming the ownership of the goods (*Boardman v. Sill*, (1808) 1 Camp. 410 n.); claiming to hold them for a debt due from a third party (*Dirks v. Richards*, (1842) 4 M. & G. 574); refusing to deliver up the goods on the ground that they belong to a third person (*Andrews v. Wade*, (Penn.) 6 Atl. Rep. 48; stipulating to receive other work in future (*Stickney v. Allen*, (1858) 10 Gray (Mass.) 352); making a binding agreement to restore possession (*The Wiles Laundering Co. v. Hahlo*, (1887) 105 N.Y. 234); agreeing to receive payment after delivery (*Lee v. Gould*, 47 Pa. St. 398); pawning the chattel (*Gallaher v. Cohen*, 1 Brown (Penn.) 43); setting up a claim which has no relation to the lien (*Weeks v. Goode*, (1859) 6 C.B.N.S. 367); destroying part of the goods (*Gurr v. Cuthbert*, (1843) 12 L.J. Exch. 309); attempting to sell the chattel (*Vincent v. Conklin*, 1 E. D. Smith (N.Y.) 203); *Bean v. Bolton*, 3 Phila. (Pa.) 87); agreeing to do the work on credit (*Riatt v. Mitchell*, (1815) 4 Camp. 146); agreeing to do certain work to be furnished during the year and to receive payment quarterly, (*Stoddard v. Huntley*, (1831) 8 New Hampshire, 441, 31 Am. Dec. 198); taking particular security for the debt (*Hewison v. Guthrie*, (1836) 2 Bing. N.C. 759; *Pinnock v. Har-*

*rison*, (1838) 3 M. & W. 539; *Davies v. Bowscher*, (1794) 5 D. & E. 488; *Cowell v. Simpson*, (1809) 16 Ves. 275). See *Stevenson v. Blakelock*, (1813) 1 M. & S. 535. This last proposition, however, depends entirely upon the special circumstances of each case, as the taking of other security does not necessarily import an abandonment of the lien. It is a question of intention to be ascertained from the relation of the parties and the special circumstances. *Re Taylor*, (1891) 1 Ch. 590, 597; *Re Bowes*, (1886) 33 Ch. D. 586. Lord Westbury in one case (*In re Leith's Estate, Chambers v. Davidson*, (1866) L.R. 1 P. C. 296, 305), said: "But lien is not the result of an express contract; it is given by implication of law. If therefore a mercantile relation which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien and limits their rights by the extent of the express contract they have made. *Expressum facit cessare tacitum*. If a consignee takes an express security, it includes general lien." (The editor of Smith's Mercantile Law, 10th ed. p. 700, questions whether these words are not too wide.) See *Wylde v. Radford*, (1864) 33 L.J. Ch. 51; *Davis v. Humphrey*, (1873) 112 Mass. 309, 315; *Angier v. Bay State Co.*, (1901) 178 Mass. 163; *Ritchie v. Grundy*, (1891) 7 Man. 532. In *Angus v. McLachlan*, (1883) L.R. 23 Ch. D. at p. 335, Kay, J., said: "It is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case or in the nature of the security which is inconsistent with the existence of the lien and which is destructive of it." In this case and some of the other cases previously cited on this point, the lien was not a mechanics' lien but the decisions upon the question of waiver would be equally applicable to mechanics' lien cases.

The claim of lien cannot be supported where the particular transaction shows that there was no intention that there should

be a lien, but some other security is looked to and relied on. *United States v. Barney*, (U.S.) 24 Fed. Cases 1014.

An examination of all the English cases leads to the conclusion that this question of waiver of the lien is a question of fact, the cardinal point being whether the new security was intended to be cumulative or substitutionary, and to determine that point all the circumstances of the case must be weighed.

The United States law on this question was thus formerly stated:—"The effect of taking security upon a lien is a matter upon which the courts have not agreed, the better opinion being that such an act is presumptive of a waiver of the lien but may be shown to have been given with other intention. 13 Am. & Eng. Ency. of Law, p. 622 (1st ed.). But a later and more accurate statement of the law is to be found in the second edition of that work where the general rule is stated to be that the mere taking of other security for a debt secured by a lien does not constitute a waiver of the lien, and that to constitute a waiver an intention to waive the lien must appear from the circumstances of the case, or from the nature of the security taken. See vol. 19, p. 29, 2nd ed.

A person may lose his lien by misconduct. In such case the owner's right to possession revives. *Scott v. Newington*, (1833) M. & Rob. 252, See *Jones v. Cliffe*, (1833) 1 C. & M. 540. A lien may also be lost where the lien claimant uses the article as his own. *Bruntnall v. Smith*, (1896) 166 Mass. 253. When the debt in respect to which the lien is claimed is satisfied the lien is lost. If for instance, a person releases the debt by executing a composition deed the lien is lost. *Cowper v. Green*, (1841) 7 M. & W. 633.

#### ATTACHMENT, EXECUTION OR ASSIGNMENT.

There is some conflict in the decisions and opinions upon the question whether an attachment or levy on execution upon the property upon which the lien is claimed, in a suit brought



by the lien claimant upon the lien claim is a waiver of the lien. One American authority, Lummus (sec. 24), inclines to the view that such an act is not a waiver of the lien, and he cites a case (*Lambert v. Nicklass*, (1898) 45 W. Va. 527) which decides that levying an attachment upon the property held under the lien does not waive the lien. There are conflicting decisions in Massachusetts on this question. *Townsend v. Newell*, (1833) 14 Pick. 332; cf. *Leg. v. Willard*, (1835) 17 Pick. (Mass.) 140. On the other hand, it has been decided in England that a person having a lien upon chattels loses it by having them levied on under an execution upon the lien debt. *Jacobs v. Latour*, (1828) 5 Bing. 130. Boisot, sec. 780, cites a Canadian case (*Lake v. Biggar*, (1862) 11 U.C.C.P. 170) as an authority deciding "that an artisan's having a lien on a chattel would not prevent his seizing it under an execution for a debt which constituted the lien nor would his asserting such a right be inconsistent with his lien or a waiver of it," but a close examination of this case shows that the judgment of the County Court Judge on that point is not directly confirmed by the Appeal Court which merely decides that there was no evidence of tender or of waiver of tender. Inasmuch as possession is essential to maintenance of a lien it is difficult to understand how a lien claimant can be considered as retaining possession when the chattel is *in custodia legis*. The decision in *Jacobs v. Latour*, *supra*, was based on that principle, that the lien claimant had parted with the possession of the chattel. The weight of authority favors the view that when a lien claimant issues an execution and the sheriff levies upon the chattel the lien is lost. It might be said that the lien claimant still has possession through his agent, the sheriff, but if so, he has so altered the nature of his possession as to destroy his lien. Possession must vest in the sheriff to enable him to sell the chattel, and when the lien claimant authorizes the levy he is deemed to have abandoned the possession by virtue of his lien. See also *Crowfoot v. London Dock Co.*, (1834) 2 Cr. & M. 637; *McMillan v. Byers*, (1886) 3 Man.



361; and *Re Coumbe, Cockburn and Campbell*, (1877) 24 Gr. 519, where a lienor was held to have waived his lien on lumber by procuring the lumber to be taken in execution at his own suit.

The interest of a lien holder is not attachable as personal property, as it is neither property nor a debt, *Yungmann v. Briesmann*, (1892) 67 L.T. 642; *Kittredge v. Sumner*, (1820) 11 Pick. (Mass.) 50; *Thames Iron Works v. Patent Derrick Co.*, (1860) 1 J. & H. 93; and for the same reason it cannot be assigned or transferred, (*Daubigny v. Duval*, (1794) 5 T.R. 604, 606), except in the case of a dissolution of a partnership where the firm was entitled to a lien. In such case one partner may assign his interest in the lien to the other who may enforce the same in the name of the firm. *Busfield v. Wheeler*, (1867) 14 Allen (Mass.) 139; *Holly v. Huggefords*, (1829) 8 Pick. (Mass.) 73. As to a sheriff's right to seize property covered by a lien, under an execution against the party claiming the lien, see *Young v. Lambert*, (1870) L.R. 3 P.C. 142; 39 L.J. P.C. 21.

On the same principle as that which applies to a levy under execution, a replevin destroys the lien acquired. *Braddyl v. Ball*, (1785) 1 Br. C.C. 427.

### TENDER

The lien is discharged by an unconditional tender of the amount due. The *Eider v. Norddentscher Lloyd*, (1893) 62 L.J.P. 65; 69 L.T. 622; *Willis v. Sweet*, (1888) 20 N.S.R. 449. In the latter case the owner, after tender of the amount due and its refusal by the mechanic, broke open the mechanic's shop to recover the chattel and the court held that he thereby committed trespass.

In an Ontario case where the mechanic agreed to accept part payment in cash and a cognovit for the balance it was held that his lien was lost on payment of the cash agreed upon and

tender of the cognovit. *Dempsey v. Carson*, (1862) 11 U.C.C.P. 462.

In *McBride v. Bailey*, (1857) 6 U.C.C.P. 523, previous cases on the subject of waiver of tender are fully reviewed.

The fact that a person was claiming to hold the goods for a certain tenable claim and for an untenable claim does not dispense with the necessity of tender of the amount of the tenable claim. *Llado v. Morgan*, 23 U.C.C.P. 517; *The Queen v. Hollingsworth*, (1899) 2 C.C.C. 291. See *Nevils v. Schofield*, (1881) 21 N.B.R. 124. A tenable claim of lien cannot be set up in an action of trover where it was not made when the goods were demanded. *Llado v. Morgan*, *supra*.

Where work was done under a contract for cash payment, an offer to endorse the amount of the bill on an acceptance of the mechanic is not such a tender as will terminate the lien. *Clarke v. Fell*, (1833) 2 L.J.K.B. (N.S.) 84.

#### ESTOPPEL.

The lien may be lost by estoppel where its assertion would operate as a fraud on innocent parties. *Howard v. Tucker*, (1831) 1 B. & Ad. 712. Assertion of payment will operate as estoppel as against those who have acted on it. *Pooley v. Budd*, (1851) 7 E.L. & Eq. 229; *Woodley v. Coventry*, (1863) 32 L.J. Ex. 185 pt. 1.

Any act or neglect of the lien claimant which induces a person to rely upon the non-existence of the lien, may defeat the lien by estoppel. *Fowler v. Parsons*, (1887) 143 Mass. 401; *Hinchley v. Greany*, (1875) 118 Mass. 595.

See *Vulcan Iron Works Co. v. Rapid City Farmers E. Co.*, (1894) 9 Man. 577, referred to in concluding paragraph of Chapter II., *ante*, at p. 15.

#### INSTANCES WHERE LIEN IS NOT WAIVED OR LOST.

Even where the lien claimant demands a larger sum than is due for the lien, a tender of the sum actually due is necessary

to discharge the lien. *Kendal v. Fitzgerald*, (1862) 21 U.C.Q. B. 585. Haggerty, J., in that case said: "Mr. Eccles' argument for the plaintiff is that by insisting on holding the goods, not only for the sum properly due, but for charges not legally demandable, the lien is waived and forfeited, without the necessity of any tender. I have hitherto understood the law to be that where the holder of goods having a clear lien, sets up not only that lien, but also another claim against the plaintiff, of an untenable character, the true owner should tender the proper amount due or an amount reasonably sufficient therefor, unless the defendant either expressly or by fair implication, gives the owner to understand that he dispenses with a tender or offer of any sum less than that which he advances as his claim." See also *Green v. Shewell*, (1838) 4 M. & W. 277.

In *Allen v. Smith*, (1862) 12 C.B.N.S. 645, on this point, Willes, J., said: "If the defendant had been shown the lesser amount he might have been willing to have accepted it." See *Nevins v. Schofield*, (1881) 21 N.B.R. 124.

In *White v. Gainer*, (1824) 2 Bing. 23, 9 Moore 41, Best, C. J., said: "I agree in the law as laid down in *Boardman v. Sill*, but not in the application of it now proposed. In that case it was held that if a party, when goods are demanded of him, rests his refusal upon grounds other than that of lien, he cannot afterwards resort to his lien as a justification for retaining them. Therefore, if, even in this case, the defendant when applied to to deliver the goods had said, 'I bought them, they are my property,' I should have holden there was a waiver of his lien, but he said no such thing, but only, 'If I deliver them up I may as well give up every transaction of my life.' "

If the lien claimant is prevented by the owner from completing his work, the lien continues. *Lilley v. Barnsley*, 1 C. & K. 344. It also continues if the reason why the lienor ceased to work upon the chattel was that the owner failed to furnish materials therefor according to his agreement. *Busfield v. Wheeler*, (1867) 14 Allen (Mass.) 139.

A set-off cannot be considered as destroying a lien unless it be so agreed upon between the parties. *Pinnock v. Harrison*, (1838) 3 M. & W. 532; *Clarke v. Fell*, (1833) 4 B. & Ad. 404; *Weguelin v. Cellier*, (1857) L.R. 6 H.L. 286. See *Roxburghe v. Cox*, (1881) 17 Ch. D. 520.

An unliquidated claim will not destroy a lien. *McFatrige v. Holstead*, (1889) 21 N.S.R. 325.

Delivery by the lien claimant to a third person, as depositary or bailee for safe custody, generally does not affect the lien, (*McLachlan v. Kennedy*, (1889) 21 N.S.R. 271), particularly if such third person re-transfers the property to the lien claimant before the lien is sought to be enforced. *Milburn v. Milburn*, 4 U.C.Q.B. 179.

If a chattel is fraudulently or unlawfully taken out of possession of the lien claimant by the owner and the lien claimant without force retakes the chattel the lien revives. *Wallace v. Woodgate*, (1824) Ry. & M. 193. In this case the lien was that of a livery stable keeper but the same principle would apply to a mechanics' lien. See also *Dicas v. Stockley*, (1836) 7 C. & P. 587; *Wilson v. Kymer*, (1813) 1 M. & S. 157; *Re Carter*, (1885) 55 L.J. Ch. 230; *Bigelow v. Heaton*, 6 Hill (N.Y.) 43. A lien is always forfeited by delivery but a delivery procured by fraud is not within the rule. *Walcott v. Keith*, 22 N.H. 196.

A lien is not destroyed though the demand in respect of which it arises is barred by the Statute of Limitations. It is the remedy, not the debt itself, that is discharged by that statute. *Spears v. Hartley*, (1819) 3 Esp. 81; *Higgins v. Scott*, (1831) 2 B. & Ad. 413; *Re Broomhead*, (1847) 16 L.J.Q.B. 355; *Curwen v. Milburn*, (1889) 42 Ch. D. 424.

The taking of a negotiable instrument by way of security will not apparently discharge the lien if the instrument is dishonored before a claim is made to enforce the lien. *Stevenson v. Blakelock*, (1813) 1 M. & S. 535.

A lien which has accrued to a partnership for work done and money expended upon machinery is not lost by the dissolu-

tion of the firm and the assignment by one partner of his interest therein to the other, but in such case the partner to whom the claim of lien has been assigned may enforce the same in the name of the firm. *Busfield v. Wheeler*, (1867) 14 Allen (Mass.) 139.

A lien is not affected by the fact that the owner of the goods becomes bankrupt. *Robson v. Kemp*, (1803) 4 Esp. 233.

A mere promise by the lien claimant, without consideration, to restore the chattel, is not a waiver of his lien. *Clarke v. Costello*, 29 N.Y.S. 937, (1894) 79 Hun. 588. An agreement to waive an existing lien is invalid, unless made with a valuable consideration. *Hollins v. Hubbard*, (1901) 165 N.Y. 534.

#### RIGHTS OF OWNER.

The owner of chattels upon which a lien is claimed may inspect or show them as long as he does not interfere with the possession of the lien-holder. *Hunter v. Leake*, (1829) 7 L.J.K.B. (O.S.) 221; *Hughes v. Lenny*, (1839) 5 M. & W. 187; *Lord Brougham v. Cauvin*, (1868) 37 L.J. Ch. N.S. 691.

Where a contract provides for stipulated work at a lump sum and such work is not done but its equivalent or better work is effected, no claim for such substituted work can be sustained. *Forman v. The "Liddesdale,"* 69 L.J.P.C. 44; (1900) A.C. 190; 82 L.T. 331. The fact that the owner of the chattel thus repaired has sold it at a price enhanced by such unauthorized labor does not amount to acquiescence on his part or acceptance of liability for the work done. (*Ib.*).

A lienor or bailee must take ordinary care of goods held under a lien. *Clarke v. Earnshaw*, (1818) Gow 30; *Angus v. McLachlan*, 23 Ch.D. 330; *Ultzen v. Nicolls*, (1894) 1 Q.B. 92; *Searle v. Laverich*, (1874) L.R. 9 Q.B. 122; *Halestrap v. Gregory*, (1895) 1 Q.B. 561; *Turner v. Stallibras*, (1898) 1 Q.B. 56.

A lien claimant cannot add to the amount for which the lien exists, a charge for keeping the chattel until the debt is paid.



Where such a charge is made and the owner of the chattel pays it under protest he may maintain an action for money had and received. *Somes v. Directors B.E.S. Co.*, (1860) 8 H.L. Cas. 338; *Bruce v. Eveson*, (1883) 1 Cababe & Ellis 18; *Pease v. Johnston*, (1905) 1 W.L.R. 208. See *Carew v. Rutherford*, (1870) 106 Mass. 1.

The goods of the Sovereign cannot be detained under a claim of lien. *Queen v. Fraser*, (1877) 2 R. & C. 431.

A mechanic has no right to detain cloth for a debt due for dressing or dyeing other cloth for the same party. *Rose v. Hart*, 8 Taunt. 499. *Close v. Waterhouse*, (1805) 6 East 523, note.

A person cannot avail himself of a lien, the discharge of which has been fraudulently prevented by his own acts. *Carey v. Brown*, (1875) 92 U.S. 171.

#### RIGHTS OF THIRD PERSONS.

Where the party entitled to a lien wrongfully parts with the goods the owner may recover them from the holder without tendering what is due on the lien, for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods. Roscoe's N.P. Evidence (17th ed.) 974; *Scott v. Newington*, (1833) 1 M. & Rob. 252; *Jones v. Cliff*, (1833) 1 Cr. & M. 540.

A person who obtains possession of goods by fraud or misrepresentation cannot claim a lien upon them. *Madden v. Kempster*, (1807) 1 Camp. 12; *Lempriere v. Pasley*, (1788) 2 T.R. 485; *Simbolf v. Alford*, (1838) 3 M. & W. 248; *Walsh v. Provan*, (1853) 8 Ex. Rep. 843.

It has been held that a vendor's lien secured by a duly recorded chattel mortgage takes precedence of a mechanics' lien for repairs subsequently done at the purchaser's request. But, as a general rule, where the mortgagee of chattels leaves the property in possession of the mortgagor and the property is of

a character that suggests use, and that repairs will be needed, and the mortgagor takes it to an artisan to be repaired, the common law lien will attach in favor of the artisan as against the mortgagee. Boisot, sec. 771. See *Hammond v. Danielson*, (1879) 126 Mass. 294; *Williams v. Allsop*, (1861) 10 C.B. (N.S.) 417; *Scott v. De La Hunt*, 5 Lans. (N.Y.) 372; *Drummond Carriage Co. v. Mills*, (1898) 40 L.R.A. 761.

#### ACCIDENTAL DESTRUCTION OF CHATTEL.

If the agreement for the work is entire and indivisible, that is, if the contract between the parties is one for the delivery of a completed article, and the chattel is accidentally destroyed, without negligence on the part of either party, before the completion of the contract, the destruction of the subject matter discharges the liability and excuses further performance of the agreement. In such case the employer of the labor cannot sue the contractor for the return of any sums already paid to him on account, in an action for money had and received, and correlative the contractor has no legal claim to compensation for that portion of the work actually executed by him at the time of the destruction of the chattel. Paine on Bailments, 163; *Appleby v. Myers*, (1867) 2 L.R. C.P. 651; *Ashford v. Booth*, (1835) 7 C. & P. 108.

## REVISED STATUTES OF ONTARIO (1897).

## CHAPTER 153.

AN Act respecting Liens of Mechanics, Wage-Earners  
and Others.

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Interpretation, s. 2	When Lien Shall Cease, ss. 23-25.
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Over What, Liens Shall Have Priority, s. 13.	Forms Authorized, s. 49.
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Payment to Defeat Lien Void, s. 15.	Persons Entitled to Lien on Chattels May Sell Same, s. 51.
Materials not to be Removed to Prejudice of Lien, s. 16.	How Far Act Applies to Railways, s. 52.

**H**ER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. **Short Title.**—This Act may be cited as "*The Mechanics' and Wage-Earners' Lien Act.*" 59 V. c. 35, s. 1.

The historical development of the mechanics' lien legislation is sketched in Chapter I. of this work. While the lien upon realty given to a mechanic differs in several important respects from the lien to which he is entitled for his labor and skill bestowed upon personalty, there is at least one point of resemblance between the two liens—they are both founded upon the theory that the mechanic having imparted additional value to the building or the chattel should be compensated therefor by being given a lien upon the structure or the chattel.

It seemed a natural extension of the common law lien upon personalty to declare by statute that the mechanic should also enjoy a lien upon any building for which he had furnished labor, and inasmuch as the building could not be enjoyed without the land it covered this lien accordingly attached to the land as well as to the building.

The nature and scope of the statutes on this subject are treated in a general way in Chapter II. and references to the principles of construction of such Acts will be found in Chapter III.

**2. Interpretation.**—Where the following words occur in this Act or in the schedules hereto they shall be construed in the manner hereinafter mentioned unless a contradictory intention appears:—

1. **“Contractor.”**—“Contractor” shall mean a person contracting with or employed directly by the owner or his agent for the doing of work or placing or furnishing materials for any of the purposes mentioned in this Act;

2. **“Sub-contractor.”**—“Sub-contractor shall mean a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor;

3. **“Owner.”**—“Owner” shall extend to and include any person, firm, association, body corporate or politic, including a municipal corporation and railway company having any estate or interest in the lands upon or in respect of which the work or service is done, or materials are placed or furnished, at whose re-

quest and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;

4. "**Person.**"—"Person" shall extend to and include a body corporate or politic, a firm, partnership or association;

5. "**Material.**"—"Material" or "materials" shall include every kind of movable property. 59 V. c. 35, s. 2(1-5).

6. "**Wages.**"—"Wages" shall mean money earned by a mechanic or laborer for work done, whether by the day or as piece work. 59 V. c. 35, s. 13(6).

7. "**Registry office.**"—"Registry office" shall include land titles office. 59 V. c. 35, s. 2(6).

(a). "*Contractor.*"—Any person contracting directly with the "owner" is a "contractor," and they are all lien-holders of class (1) referred to in Chapter II., *ante*, at p. 12.

(b). "*Sub-contractor.*"—This definition includes all persons who are within class (2) referred to in Chapter II., *ante*, at p. 12. Some text-writers on this subject in referring to sub-contractors describe them as "contractors in the second degree," or "contractors in the third degree," etc., according to their varying remoteness from the original contractor.

(c). "*Owner.*"—As section 7, *post*, designates the property or interest of the "owner" which is attached by the lien, the cases cited under that section are important for consideration in connection with this section. See section 7, *post*, at p. 92.

Municipal corporations are now included as within the definition of "owner" given in this section. See remarks upon the general principles applicable to the question whether a statute creates a mechanics' lien against property held by a municipal corporation, and cases cited under section 4, note "h," at p. 83. A railway company is also included as within the definition of



"owner" in this section. See remarks dealing with the general effect of this statute upon railway companies, *post*, at p 99.

Where buildings are erected on lands leased to a married woman on a verbal undertaking by her to secure the builder by a mortgage of the premises and a bill of sale on all her other property, the builder has a lien on the leasehold premises and the other personal property.

Such lien has priority over a subsequent decree in a suit by a creditor charging the married woman's estate with payment of the debt, though such debt may have accrued prior to the lien. The creditor has a right to sell under his decree subject to the lien. *Chute v. Gratten*, (1894) 32 N.B.R. 549.

As to any contracts made with a minor or other person under legal disability, see note (a) section 4. See also *Collins v. Martin*, (1877) 41 U.C.Q.B. 602.

The power of a trustee in whom the legal title is vested to subject the estate to a mechanics' lien for the repair and improvement thereof depends upon his power to contract for improvements and repairs at the expense of the estate. See cases cited under sec. 7, at p. 96. As to the English rule of liability of a trust estate for the debts of a trustee see *In re Frith*, (1902) 1 Ch. 342, and *In re Raybould*, (1900) 1 Ch. 199.

(d). "*Or service.*"—These words would probably be construed as enlarging the scope of the section so as to clearly include professional services rendered by engineers and architects in respect to the building, in addition to superintendence. See in this connection remarks under section 4, *post*, at p. 59, and also at p. 70.

### THE ELEMENT OF CONSENT.

(e). "*With whose privity or consent.*"—To create a lien against the interest of an "owner" there must be something in the nature of direct dealing between the contractor and the "owner" or person whose estate is sought to be charged. Where an "owner" merely has knowledge that the work is being done or that the material is being furnished, and silently assents to and benefits by the furnishing of such work or materials a lien is not thereby created against his interest. See *Gearing v. Robinson*, (1900) 27 A.R. 364, and other Canadian cases cited under section 4, *post*, note (b), at p. 60.

“Consent” implies the power of preventing. See *Ottiwell v. Watkins*, 15 Daly (N.Y.) 308. It must be shown that the party whose consent is alleged had the legal capacity to confer the right to perform the work and furnish the materials. *Donahy v. Clapp*, (1853) 12 Cush. 440.

Consent must be given unconditionally. *Conant v. Brackett*, (1873) 112 Mass. 18; *Hervey v. Gay*, (1880) 42 N.J.L. 168.

In a recent New York case (*National Wall Paper Company v. Sire*, (1900) 163 N.Y. 122) it was held that consent need not be expressly given in order to make an owner liable, but might be implied from his conduct and attitude in respect to improvements in process of construction upon his premises; but the facts from which it may be implied must be such as to indicate at least a willingness on the part of the owner to have the improvements made or an acquiescence in the means adopted for that purpose with knowledge of the object for which they are employed. Consent may be implied where he leases the premises with permission to his tenant to repair at his own cost, the improvements to belong to the owner at the end of the term, and where he constantly inspects the tenant's subsequent voluntary and expensive improvements during five months and expresses himself pleased with them and never objects to them although he knows that the tenant expects him to bear at least a part of the expense.

In another New York case (*Rice v. Culver*, (1902) 172 New York App. 60), Cullen, J., in delivering the judgment of the court, said: “There is a marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he has no right to prevent, and his actual and express consent or requirement that the improvement shall be made. It is the latter that constitutes the consent mentioned in the statute. To fall within that provision the owner must either be an affirmative factor in procuring the improvement to be made or having the possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it. It was well said by Justice Follett, in *Vosseller v. Slater*, 25 App. Div. 368, affirmed 163 N.Y. App. 564: ‘The term “with the consent of the owner,” as used in the statute, implied that the owner has the power to give or withhold his consent in respect to the construction, alteration or reparation of the building. In case the vendor in an executory contract has no authority to require the vendee to build, alter or

repair, and has no power to prevent him from doing so, his interest cannot be charged with a mechanics' lien for the erection, reparation or improvement of a building ordered by the vendee, simply because he (the vendor), knowing that the work has to be done and knowing that it is being done, does not try to stop what he has no power to prevent.' An obvious distinction is drawn between this class of cases and another class in which the tenant covenants by his lease to erect buildings or make improvements. In the latter cases the estate of the landlord is properly held liable because not only does he require the improvement to be made, but the improvement enures to his benefit, either because it reverts to him, at the expiration of the demised term, or because his rent proceeded from its use." See *Jones v. Menke*, (1901) 168 N.Y. App. 61.

In another New York case, *Beck v. Catholic University*, (1902) 172 N.Y. App. 387, the question of "consent" of owner is discussed and a number of important cases are reviewed. It was held in that case that where land sold under an executory contract was retaken by the vendor upon the vendee's default in payment, a person who performed labor and furnished materials for buildings erected upon the land by the vendee while in possession thereof was not entitled to a judgment enforcing a mechanics' lien thereon against the vendor, where there was no proof that the vendor had any knowledge as to the character of the building to be erected or of the erection of the building constructed or that the vendor acquiesced therein, and the only ground relied upon as constituting the vendor's consent to the erection of such building was a provision of the contract that the vendee should have immediate possession of the property "for the purpose of erecting buildings thereon."

The insertion in a contract for sale of the real estate of a clause requiring the vendee to erect buildings thereon sufficiently shows the vendor's consent to such erection, so as to render his interest in the property liable for liens for labor and material. *Miller v. Mead*, (1891) 127 N.Y. 544.

The owner by his contract with the contractor impliedly consents to the furnishing of work and materials within the terms of the contract by sub-contractors, although there is no privity of contract between them and the owner. *Moore v. Erickson*, (1893) 158 Mass. 71; *Wheeler v. Scofield*, (1876) 67 N.Y. 311. See Boisot, sec. 18.

As to effect of consent of mortgagee where materials were furnished and used with his consent, see *McDowell v. Rockwood*, 182 Mass. 150. Upon the general question of "consent," see also *O'Driscoll v. Bradford*, (1898) 171 Mass. 231; *Saunders v. Bennett*, (1893) 160 Mass. 48; *Gilmour v. Concord*, (1904) 89 N.Y.S. 689; 96 N.Y. App. Div. 358; *Spruck v. McRoberts*, (1893) 139 N.Y. 193; *Borden v. Mercer*, (1895) 163 Mass. 7; *Wahlstrom v. Trulson*, (1896) 165 Mass. 429. Consent to the erection of a building covers past as well as future work. See *Davis v. Humphrey*, 112 Mass. 309. *Courtemanche v. Blackstone Ry. Co.*, (1898) 170 Mass. 50; *Anderson v. Berg*, (1899) 174 Mass. 404.

Where a lease contains a provision that the lessee shall at his own expense make certain improvements on the premises and the lessee in the performance of his agreement materially departs from the specifications, thereby largely increasing the cost of the improvement, the consent necessary under the law to render the owner liable for the work done and the materials furnished will not be implied from the mere acquiescence by the owner in the alteration, in the absence of any affirmative act or declaration on his part which might have misled the lessee or the contractor. *De Klyn v. Gould*, (1901) 165 N.Y. App. 282.

### LEASEHOLD INTERESTS.

A lessee whose interest is subject to a lien cannot defeat the lien by surrender of the term (*Dobschuetz v. Holliday*, 82 Ill. 371), but a mechanics' lien which attaches to a leasehold estate is subject to all the conditions of the lease: *Lowry v. Woolsey*, (1894) 83 Hun. 257; *Williams v. Vanderbilt*, (1893) 145 Ill. 238. In the latter case there was a forfeiture of the lease and not as in the former case a voluntary surrender of it.

Where the lessee's estate is merged in the fee such merger does not destroy a lien upon the leasehold estate. *Jones v. Manning*, 6 N.Y. Supp. 338.

(f). "*And all persons claiming under him.*"—The effect of this portion of section 2 when read with section 7 is dealt with under the latter section at note (a) at p. 92.

**3. Contracts waiving application of Act to be void.**—(1) Every agreement or bargain, verbal or written, express or implied,



which has heretofore been made or entered into, or which may hereafter be made or entered into, on the part of any workman, servant, laborer, mechanic, or other person employed in any kind of manual labor intended to be dealt with in this Act, by which it is agreed that this Act shall not apply, or that the remedies provided by it shall not be available for the benefit of any person entering into such agreement, is and shall be null and void and of no effect as against any such workman, servant, laborer, mechanic, or other person. 59 V. c. 38, s. 3.

(2) This section shall not apply to any foreman, manager, officer or other person whose wages are more than \$3 a day. 59 V. c. 38, s. 12.

(a) "*Of no effect as against any such workman.*"—This section is intended to protect those who do the manual labor, and the effect of the whole section is to limit its application to that class.

**4. Nature of lien.**—Unless he signs an express agreement to the contrary, and in that case subject to the provisions of section 3, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation or fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees, or the appurtenances to any of them, for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit and ornamental trees, and appurtenances thereto, and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the said work or service is performed, or upon which such materials are placed, or



furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) by the owner. 59 V. c. 35, s. 5; 60 V. c. 24, s. 1.

(a). “*Any person.*”—The word “person” is defined in sec. 2, sub-sec. 4, *ante*, p. 53, and includes a body corporate or politic, a firm, partnership or association.

A minor may be legally a lien claimant, but being under a common law disability to contract cannot by a contract for the improvement of his land subject it to a mechanics’ lien for such improvement. *McCarty v. Carter*, (1868) 95 Am. Dec. 572; 49 Ill. 53; *Alvey v. Reed*, 7 Am. St. Rep. 690; *Hall v. Kjer*, (1885) 47 N.J.L. 340. The same principle would apply to a contract made with any one who can set up legal disability. Building materials cannot be considered necessities and declarations of the infant that he was of full age when he made the contract are not sufficient to support the lien as against a subsequent purchaser from him: *Boisot*, sec. 282.

An action to enforce a mechanics’ lien is not an action for any kind of debt, but is for penalty or forfeiture. *Dillon v. Sinclair*, 7 B.C.R. 328.

This section does not allow an owner to enforce a claim against his own property to the prejudice of third persons. *Phillips*, S. 39. See *Kerby v. Daly*, (1871) 45 N.Y. 84.

(b). “*Performs any work or service.*”—A blacksmith employed for sharpening and repairing tools at a mine is entitled to a lien; a cook is not. Work on tools is work on a mine; cooking is not. *Davis v. Crown Point M. Co.*, (1901) 3 O.L.R. 69. But a material man is not entitled to a lien for tools furnished the contractor with which to work on the building. *Evans v. Lower*, (1904) 58 Atl. Rep. 294.

To create a lien there must be something in the nature of direct dealing between the contractor and the person whose estate is sought to be charged. Mere knowledge that the work is being done or the materials furnished is not enough, nor is silent assent.

The lien claimant to succeed must have been employed to do the work or furnish the materials by some one having either an interest in the land or an interest in a contract made with the

owner. The person with whom the contract was made must be an "owner" or else some relation of the parties must have existed which would give a right of lien. *Gearing v. Robinson*, (1900) 27 A.R. 364; *Webb v. Gage*, (1902) 1 O.W.R. 327; *Flack v. Jeffrey*, (1895) 10 Man. 514; *Blight v. Ray*, (1893) 23 O.R. 415; *Graham v. Williams*, (1884) 8 O.R. 478; 9 O.R. 458; *Sampson v. Dalrymple*, (1852) 11 Cush. 308; *Batchelder v. Hutchinson*, (1894) 161 Mass. 462, 464. See also *Garing v. Hunt*, (1895) 27 O.R. 149; *Cornell v. Barney*, (1884) 33 Sup. Ct. N.Y. 134; 94 N.Y. 394.

The contractor is not entitled to a lien merely because he has performed work or service; such work or service must be performed under a definite contract. If, therefore, a contractor is wrongfully prevented by the owner from fully performing his contract he has no lien for damages caused thereby, although he has a right of action for such damages. In like manner, if the contract is rescinded, the contractor cannot claim a lien for work or materials furnished afterwards; *Boisot*, S. 65; nor can the contractor recover unless he shows that the person with whom he made the contract had some interest in the land and was not a mere occupant without title. *Gearing v. Robinson*, (1900) 27 A.R. 364; *Webb v. Gage*, (1902) 1 O.W.R. 327; *Stevens v. Lincoln*, (1874) 114 Mass. 476.

In *Wake v. C. P. Lumber Co.*, (1901) 8 B.C.R. 358, plaintiff was employed as a logger by one Green, who had a contract with defendant company. An action was brought by plaintiff to enforce a mechanics' lien for wages. Prior to this action, plaintiff and sixteen others obtained a judgment against Green under the Woodman's Lien Act for the gross amount of their wages and had seized the logs and sold. Held, that in the absence of express enactment they could not obtain another judgment under the Mechanics' Lien Act for the same claim.

A contractor cannot recover in an action for damages for wrongful dismissal and breach of contract and for declaration of lien already registered. A motion was granted to cancel registration and strike out statement of claim as the claim disclosed no reasonable cause of action. On appeal the Divisional Court varied the order by omitting the part which directed the vacating of the lien, without prejudice to the right of plaintiff to file a new statement of claim for damages for wrongful dismissal. *Beveridge v. Hawes*, (1903) 2 O.W.R. 619.

## CONDITIONS PRECEDENT TO RECOVERY.

The contractor cannot recover unless he complies with any term of the contract which is made a condition precedent to payment, such as the procuring of an engineer's, architect's or surveyor's certificate. *Morgan v. Birnie*, (1833) 9 Bing. 672; *Sharpe v. San Paulo Ry. Co.*, (1873) L.R. 8 Chy. 597; *Tharsis Sulphur & C. Co. v. McElroy*, (1878) 3 App. Cas. 1040; *Lakin v. Nuttall*, (1879) 3 S.C.R. 685; *Jones v. The Queen*, (1877) 7 S.C.R. 570; *O'Brien v. The Queen*, (1880) 4 S.C.R. 529; *Coatsworth v. City of Toronto*, (1858) 7 C.P. 490; 8 C.P. 364; *Ekins v. Bruce*, (1870) 30 U.C.Q.B. 48; *Ferguson v. Galt*, (1873) 23 U.C.C.P. 66; *Reg. v. Cimon*, (1893) 23 S.C.R. 62; *Ardagh v. City of Toronto*, (1886) 12 O.R. 236; *Robinson v. Owen Sound*, (1888) 16 O.R. 121; *Mangan v. Town of Windsor*, (1894) 24 O.R. 675; *Small v. McCollough*, (1857) 3 Allen (N.B.) 484; *Carter v. Landry*, (1880) 19 N.B.R. 516; *Flood v. Morrissey*, (1880) 20 N.B.R. 5; *Kempster v. Bank of Montreal*, (1871) 32 U.C.Q.B. 87; *Stevenson v. Watson*, (1879) 4 C.P.D. 148; *Gilbaut v. McGreevy*, (1890) 18 S.C.R. 609; *Robins v. Goddard*, 73 L.J.K.B. 712; (1904) 2 Ch. 261; 90 L.T. 772; *Starrs v. The Queen*, (1887) 1 Ex. C.R. 301; *The Queen v. Starrs*, (1889) 17 S.C.R. 118; *Neelon v. City of Toronto*, (1895) 25 S.C.R. 579; *McDonald v. Oliver*, (1883) 3 O.R. 310; *Ross v. The Queen*, (1895) 4 Ex. C.R. 390; *Murray v. The Queen*, (1895) 5 Ex. C.R. 19; *Murray v. The Queen*, (1896) 26 S.C.R. 203; *Goodwin v. The Queen*, (1897) 28 S.C.R. 273 (distinguishing *Murray v. The Queen*, 26 S.C.R. 203, and reversing *Murray v. The Queen*, 5 Ex. C.R. 293); *Sorette v. Nova Scotia Development Co.*, (1889) 31 N.S.R. 427; *Leroy v. Smith*, (1900) 8 B.C.R. 293. See also *McNamara v. City of Toronto*, (1892) 24 O.R. 313; *Farquhar v. City of Hamilton*, (1892) 20 A.R. 86; *Good v. Toronto, H. & B. Ry.*, (1899) 26 A.R. 133; 35 C.L.J. 278; 30 S.C.R. 114; *Walkley v. City of Victoria*, (1900) 7 B.C.R. 481; *Whiting v. Blondin*, (1904) 34 S.C.R. 453.

A provision that an architect's certificate shall not be set aside for any suggestion of fraud is not void as contrary to public policy. *Tullis v. Jackson*, (1892) 67 L.T. 340.

The contractor is bound, in the absence of fraud or undue influence or mistake, by the certificate of the engineer, and cannot dispute the same. *Canty v. Clarke*, (1879) 44 U.C.R. 505; *Guelph Paving Co. v. Town of Brockville*, (1905) 5 O.W.R. 626.

But the rule that a contractor is bound by the terms of a contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and believed by the contractor to be the engineer of a third person. *Good v. Toronto, H. & B. Ry.*, (1899) 35 C.L.J. 278; 26 A.R. 133; affirmed 30 S.C.R. 114 *sub nom. Dominion Construction Co. v. Good*. See *Ludlam v. Wilson*, (1901) 37 C.L.J. 819, as to effect of non-disclosure of family relationship and financial connections between the superintendent of work, who was to furnish the certificate, and the defendant.

As to engineers exceeding their powers in determining certain points in dispute, see *Peters v. Quebec Harbor Commissioners*, (1891) 19 S.C.R. 685.

See provision where the architect or engineer refuses to give final certificate, section 22, sub-section 5, *post*.

The plaintiff agreed with defendant to do tunnelling in mineral claims in which the defendant and one McLeod were interested, and the agreement was contained in correspondence, part of which read: "I will pay you on the completion of each eighty feet of tunnelling. All you need to do is to have McLeod to certify that you have done the work." McLeod did not give a certificate. In an action by plaintiff to enforce a mechanics' lien, it was held by Bole, Co.J., and affirmed by the Supreme Court of British Columbia (Irving, J., dissenting) that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover. *Leroy v. Smith*, (1900) 8 B.C. 293.

Where a contract provides for the certificate of an architect and no architect is appointed, the provision is inoperative. *Degagne v. Chave*, (1895) 2 Terr. L.R. 210.

When a building contract stipulates that the architect's certificate shall be conclusive evidence of the builder's right to final judgment, and the certificate is produced and not impeached, there is no ground for refusing enforcement of the lien. *Snaith v. Smith*, 25 N.Y. Supp. 513.

An architect in such cases occupies the position of an arbitrator, and is therefore not liable to an action by the owner for negligence in the exercise of such functions. *Chambers v. Goldthrope*, 70 L.J.K.B. 482; (1901) 1 K.B. 624; 84 L.T. 444. Pos-



sible bias does not disqualify an engineer whose certificate is required under the contract. *Farquhar v. City of Hamilton*, (1892) 20 A.R. 86.

Where under a contract which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer who was also the sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months and acted in a shifting and vacillating, though not fraudulent manner and probably caused heavy loss to the contractors by his mistakes:—Held, that in the absence of collusion on the part of the corporation the certificate could not be set aside. See *Walkley et al. v. City of Victoria*, (1900) 7 B.C.R. 481, a most instructive case on this branch of the law.

Where a person by a contract takes upon himself the responsibility that certain events shall take place or to pay damages if from any cause he is prevented from carrying out the contract, the fact that the contract becomes impossible of performance does not excuse such party for non-performance of the contract. *Ashmore v. Cox*, 68 L.J.Q.B. 72; (1899) 1 Q.B. 436 (Ld. Russell of Killowen, C.J.). See *Dermott v. Jones*, (1864) 2 Wall. 1; *Thorn v. Mayor of London*, (1874) L.R. 9 Ex. 163; s.c., L.R. 10 Ex. 112.

On default by builder in contract to build a house he was dismissed and the owner verbally employed a sub-contractor to finish the building. Held, that this was a new contract which need not be in writing and also that the sub-contractor after the new contract was entitled to a mechanics' lien as contractor and not as sub-contractor. Held, also, that the conditions of the old contract were not applicable to the new contract and that the non-production of an architect's certificate required by the contract of the dismissed contractor as a condition precedent, did not preclude the sub-contractor from recovering under the oral agreement, \*provided the work was so done as to morally entitle him to such certificate. *Bond v. Treahey*, (1876) 37 U.C.Q.B. 360 distinguished. *Guest v. Hunter*, (1882) 3 C.L.T. 33; *Petrie v. Hunter*, (1882) 2 O.R. 233; 10 A.R. 127.

These latter cases are referred to in *King et al. v. Low*, (1901) 3 O.L.R. 234 and in *Leroy v. Smith*, (1900) 8 B.C. 300.



## RECOVERY FOR PARTIAL PERFORMANCE.

While, ordinarily, in order to claim a lien, the contractor must show that he has performed his contract, yet, a contractor may recover for partial or inexact performance of the contract in some cases, e.g., where the defect in the building was known before the completion of the work and defendant allowed the work to go on, minimizing the defect, and after completion promised to pay and made no complaint until after the registration of the lien (*Holtby v. French*, (1902) 1 O.W.R. 821); where a strict compliance was waived by the owner (*Heckmann v. Pinkney*, (1880) 81 N.Y. 211); where the completion was dispensed with by agreement (*Moore v. Erickson*, (1893) 158 Mass. 71; *Connolly v. Sullivan*, (1899) 173 Mass. 1); where the deviation in the contract arose in respect to a matter not a condition precedent to recovery (*Lucas c. Goodwin*, (1837) 3 Bing. N.C. 737); where the owner refused to pay an instalment of the contract price, or to furnish the necessary materials as agreed (*Thomas v. Stewart*, (1892) 132 N.Y. 580; *Wright v. Reusens*, (1892) 133 N.Y. 298; *Smith v. Norris*, (1876) 120 Mass. 58). See also *Carew v. Stubbs*, (1892) 155 Mass. 549, and *Hunter v. Walter*, 12 N.Y. Supp. 60, affirmed (1891) 128 N.Y. 668, where the owner failed to pay instalments of the price already earned. Failure by the owner to supply material which the contract provides he shall supply discharges a penal clause. *Degagne v. Chave*, (1895) 2 Terr. L.R. 210. Insolvency of the owner which prevented performance is a valid excuse for non-performance. *Henderson v. Sturgis*, 1 Daly (N.Y.) 336.

There are several decisions by Massachusetts courts (see *Butterfield v. Byron*, (1891) 153 Mass. 517; *Angus v. Scully*, (1900) 176 Mass. 357) holding that where performance of the contract was prevented by destruction of the subject matter a contractor may recover for partial performance, but Canadian and English decisions are opposed to this view of the law. The Canadian law on this point is illustrated by the case of *King et al. v. Low et al.*, (1901) 3 O.L.R. 234, following *Appleby v. Myers*, (1867) L. R. 2 C.P. 651. The defendants, who had taken a contract for the erection of a dwelling house for a fixed sum, accepted the plaintiff's tender to do the plumbing and tinsmithing work for \$500, but, before the completion of the plaintiff's contract, though after they had done work up to \$488, the building was destroyed

by fire, not happening by the fault of the plaintiffs, defendants, or the owner. The defendants had received two sums amounting to \$1,500 on account of their contract, but they denied that any portion of it was for work done by the plaintiffs. In an action by the plaintiffs to recover the \$488, on a *quantum meruit*: Held, that where, as here, the contract is to do work for a specific sum, there can be no recovery until the work is completed, or unless the failure to complete is caused by the defendant's fault, and this applies as well to original as to sub-contractors, and as the plaintiffs admitted the non-completion by suing on a *quantum meruit*, and there was nothing to show any default on the defendant's part, there could be no recovery.

A different phase of this question as to the effect of the destruction of the subject matter is dealt with by the decision in *Ontario L. & P. Co. v. Baxter & Galloway Co.*, (1903) 5 O.L.R. 419.

In *Hill v. Fraser*, (1858) 2 Thom. (Nova Scotia) 294, where a party entered into an agreement to build a coffer dam and there was no sustaining sub-stratum, it was held that an action would not lie for the work and labor performed in attempting to complete the contract. Where the plans furnished to the plaintiff represented the existence of a sufficient sub-stratum, which did not in fact exist, and his labor was thus rendered useless, he could only recover for the work done before that fact was discovered. In this case the distinction between a warranty and a representation and between a representation inducing a contract and a representation forming part of a contract is discussed. See also *Thorn v. Mayor of London*, (1874) L.R. 9 Ex. 163; S.C., L.R. 10 Ex. 112.

See also *McKenna v. McNamee*, (1887) 14 A.R. 339; 15 S.C.R. 311.

Trifling omissions, in the performance of the contract, will not defeat the lien. *Glacius v. Black*, (1872) 50 N.Y. 145.

A building contract provided that in case the works were not carried on with such expedition and with such materials and workmanship as the architect might deem proper, then, with the special and written authority of the proprietor he should be at liberty after giving him seven days' notice in writing to dismiss the contractor and employ other persons to finish the work, etc. Held, that such special authority meant an authority to be acted upon with reference to some individual contractor and not a gen-

eral authority "to dismiss in his discretion any workman or contractor." Also, that the notice should intimate to the contractor in what respect the architect was dissatisfied, and what he required to be done, so that during the time mentioned in the notice the contractor might have the opportunity of removing the objection, in default of which the architect might dismiss him at the expiration of the time. Another condition provided that the architect might dismiss any workman who might be disapproved of. Held, that this clearly applied only to a workman as distinguished from a contractor. Held, also, that when a contractor is prevented from obtaining the certificate by the wrongful act of the "owner" he may recover without the certificate. *Smith v. Gordon*, (1880) 30 U.C.C.P. 553.

In an action to enforce a lien plaintiff joined the architect as a defendant and claimed damages against him for fraudulently withholding a certificate. Held, that the architect should be struck out as defendant and the claim against him dismissed. Actions under the Mechanics' Lien Act have many incidents created by the Act which other actions do not have, but no power is given by the Act to join such a claim. The claim would be good as against the owner, but as against the architect the plaintiff must pursue his ordinary remedy. *Bagshaw v. Johnson*, (1901) 3 O. L.R. 58.

The word "work" is at least as broad in its meaning as the word "labor" which is used in the Massachusetts Act. It was held in a case (*Mitchell v. Packard*, (1897) 168 Mass. 467) under that Act that superintendence is labor, though it involves little physical effort. The Ontario Statute uses also the word "service," which is even more comprehensive. But it was held in *Richmond & Irvine Construction Co. v. Richmond Ry. Co.*, (1895) 31 U.S. App. 704; 34 L.R.A. 625; that legal or other services rendered in acquiring rights of way for a railroad did not constitute services within the meaning of a lien law.

#### EFFECT OF TAKING POSSESSION.

Mere possession or user by the owner of the building upon which the work was done is not a sufficient acceptance of an incomplete or imperfect performance of the contract so as to entitle the contractor to recover. *Brydon v. Lutz*, (1891) 9 Man. 64; *Munro v. Butt*, (1858) 8 E. & B. 738; *Gearing v. Nordheimer*,

(1876) 40 U.C.Q.B. 21; *Sumpter v. Hedges*, (1898) 1 Q.B. 673; 78 L.T. 378; *Oldershaw v. Garner*, (1876) 38 U.C.Q.B. 21; *Ellis v. Hamlin*, (1810) 3 Taunt. 52; *Pattinson v. Luckley*, (1870) L. R. 10 Ex. 330; *Wood v. Stringer*, (1890) 20 O.R. 148; *Barrell, ex parte, in re Parnell*, (1876) 44 L.J. Bk. 68; L.R. 10 Ex. 512; *Keen v. Keen, In re*; *Collins, ex parte*, 71 L.J.K.B. 487; (1902) 1 K.B. 555. See also *Hart v. Porthgain Harbor*, 72 L.J. Ch. 426; (1903) 1 Ch. 690; 88 L.T. 341 (applying *Sumpter v. Hedges, supra*); *Foster v. Hastings Corporation*, (1903) 87 L.T. 736; *Leroy v. Smith*, (1900) 8 B.C.R. 293. In *McArthur v. Dewar*, (1885) 3 Man. 72, Killam, J., said: "The owner of the land has not an option of giving up the benefit received, the portion of the building erected has become a part of his land and is not severable therefrom, and the mere retention of the erection upon the lands and the use of it with the other portion of the lands cannot give rise to an implied contract to pay for the work done." In *Wood v. Stringer, supra*, it was contended that certain pews were accepted and used by the church, but Boyd, C., on this point said: "However, the church had to be occupied, and I do not think this should operate as an acceptance of this bad work."

Upon the question of the effect of taking possession and making payment on account, see *Laurence v. Village of Lucknow*, (1887) 13 O.R. 421, in which *Munro v. Butt, supra*, is distinguished. See also recent English case cited in Chapter IV., "Liens on Personality," at p. 48, where it was held that the fact that the owner of the repaired chattel sold it at a price enhanced by unauthorized labor, did not amount to acquiescence on his part or acceptance of liability for the work done. See also *Black v. Wiebe*, (1905) 1 W.L.R. 75, reported fully under section 12 of Manitoba Lien Act, *post*.

Acceptance of a building by the owner as completed, operates as a waiver of the requirement that the contractor shall procure the architect's certificate before he shall be entitled to final payment. *Smith v. Alker*, (1886) 102 N.Y. 87.

Non-performance of one contract does not affect the claimant's rights to a lien under another contract which has been performed, though both relate to the same premises. *Hunter v. Walter*, 12 N.Y. Supp. 60, affirmed (1891) 128 N.Y. 668.

Although the subsequent acts of the parties to a contract are not admissible as evidence to vary its terms, they may prevent one of the parties from insisting upon the strict performance of the



original agreement. *Bruner v. Moore*, 73 L.J. Ch. 377; (1904) 1 Ch. 305; 89 L.T. 378 (following *Hughes v. Metropolitan Ry*, (1877) 46 L.J.C.P. 583; 2 App. Cas. 439).

Where under a building contract work was to be completed by "Nov. 31st," under penalty of damages: Held, that this must be construed to mean Nov. 30th. *McBean v. Kinnear*, (1892) 23 O.R. 313.

Under a contract to execute certain work, where there was a wrongful seizure of the works by the defendants, the plaintiff was held entitled to determine the contract. *Lodder v. Slowey*, 73 L.J.P.C. 82; (1904) A.C. 442; 91 L.T. 211.

As to the rights of parties where in a contract between a builder and an owner a date was fixed for the completion of the building and delay occurred by default of sub-contractors:—See *Mitchell v. Guildford Union*, (1903) 1 L.G.R. 857; 68 J.P. 84.

A contractor may not show that materials used in construction are preferable to those required by the contract. *Schultze v. Goodstein*, (1904) 180 N.Y. App. 248.

As to default in building contract by the owner, see *Wells v. Army & Navy C. S.*, (1902) 86 L.T. 764.

As to dismissal of contractor and question of right of removal of plant, see *Ashfield v. Edgell*, (1891) 21 O.R. 195.

For legal effect of accident to subject matter, see *Laine v. The Queen*, (1896) 5 Ex. C.R. 103.

Time might be of the essence of a contract even without any express stipulation, if it appears that such was the intention. *Oldfield v. Dickson*, (1889) 18 O.R. 188.

Plaintiff entered into a written contract with the City of Halifax for the removal of an old building and the erection of a new one in its place. One of the clauses provided that if at any time the work was not being proceeded with at the rate to insure its completion by May 1st, 1888, the City Board of Works might take possession and complete, in which case the plaintiff was to suffer a deduction of 15 per cent. of the value of the work thereafter done. In March, 1888, when it had long been evident that the work could not be completed within the contract time, the city took over the work and ejected plaintiff. The plaintiff alleged that the work had not been proceeded with with proper diligence during the previous year, when no action had been taken by the city, and that the city, by allowing him to resume work



in the previous December, when it was obvious that he would not be able in any case to complete it within the contract time, had waived its rights under the forfeiture clause. Held, that the city was not bound to have exercised its right as soon as it had reason to suspect that the work would not be completed, but without waiving its right might delay action until the fact became established beyond all doubt. Also that the plaintiff's resumption of the work was through no act of the city, but of his own motion at a time when he was in the best position to know whether he could fulfil the terms of his undertaking. *Milliken v. City of Halifax*, (1889) 21 N.S.R. 418.

#### CLAIMS OF ARCHITECT.

Where an architect was to receive a commission of 2 per cent. on the cost of a building which was to be erected, for preparing plans and specifications, with 1 per cent. additional for superintendence, and the plans were approved of, but the building was not proceeded with beyond the foundation owing to an advance in materials: Held, that the plaintiff was entitled to recover the commission of 2 per cent. on the estimated cost. *Hutchinson v. Conway*, (1900) 34 N.S.R. 554.

It was held in an Ontario case (*Arnoldi v. Gouin*, (1876) 22 Gr. 314) that an architect is entitled to a lien for drawing plans and specifications and superintending the erection of a building. In that case no distinction was raised by counsel between the right to charge for superintendence and the right to charge for drawing the plans. An architect's right to a lien for drawing plans and specifications has been denied by several courts of the United States, one of the most recent decisions being *Mitchell v. Packard*, (1897) 168 Mass. 467, in which the court held that while a lien could be maintained by an architect for labor performed by him in the supervision of the erection of a building, he was not entitled to a lien for the preparation of plans and specifications therefor. Similar decisions have been given by the courts in Pennsylvania, Missouri, Kentucky and Maine. In New York, apparently the only cases upon the question are cases where the architect acted in both capacities, although in deciding that he is entitled to a lien he is sometimes referred to as a supervising architect. See *Stryker v. Cassidy*, (1879) 76 N.Y. 50. In some United States cases stress seems to be laid upon the circumstance

that the work of drawing plans and preparing specifications is essentially professional work, and therefore not within the scope of a mechanics' lien statute. But a great deal depends upon the precise words of the statute, and the lien Acts prevailing in Canada seem broad enough in their terms to include the "work" or "service" rendered by an architect in drawing the plans for the building.

The preparation of the plans and specifications appears to be regarded under some decisions in United States' courts as merely preliminary to the construction of a building and in effect to be too remote to be treated as work used in the erection of the building. The wording of the Mechanics' Lien Acts in Massachusetts and in various other States undoubtedly warrants such a view, but the Lien Acts existing in Canada are much wider in their scope. Under them a lien is given not only for "work," but for "service," and such work or service may be not only "upon," but "in respect of" a building, etc., so that the Acts are broad enough to not only cover the manual labor of the workman, but the professional services of the architect. The services rendered by an architect in drawing the plans and preparing the specifications are not any more remote than the services of the blacksmith who sharpens the tools which other workmen use upon the building, and under a recent decision in Ontario a blacksmith was held entitled to a lien for such work. See *Davis v. Crown Point M. Co.*, (1901) 3 O.L.R. 69.

Where a statute gave a lien for "work or labor upon . . . a building," the services of an architect in the preparation of plans and in superintendence were within the statute. *Hughes v. Forgeron*, (1892) 16 L.R.A. 600; *Mutual Ins. Co. v. Rowland*, (1875) 26 N.J. Eq. 389.

As to failure to complete building contract and faulty construction of the work, see *Bender v. Carrier*, (1877) 15 S.C.R. 19.

Contractors for the erection of a building could not recover in an action where a municipal by-law passed two days after the contract was signed, made the building contract illegal. *Spears v. Walker*, (1884) 11 S.C.R. 113.

A contractor cannot recover from the owner in an action upon the contract where the performance was prevented by an Act of Parliament. *Samson v. The Queen*, (1888) 2 Ex. C.R. 30.

## QUANTUM MERUIT.

Where there is a contract to do specified work for a fixed sum with a proviso for payment of proportionate amounts equal to 80 per cent. of this fixed sum as the work is done and the balance of 20 per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right of payment and where the work is not completed there is no right to recovery for the portion done as upon a *quantum meruit*. *Sherlock v. Powell*, (1899) 26 A.R. 407. See *Lowther v. Heaven*, (1889) 41 Ch. D. 249, not cited in *Sherlock v. Powell*, *supra*; *Black v. Wiebe*, (1905) 1 W.L.R. 75.

As to oral alteration of terms and *quantum meruit*, see *Barry v. Ross*, (1891) 19 S.C.R. 360.

Where a tender for the erection of a building is made and accepted to deceive other tenderers, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a *quantum meruit*. *Degagne v. Chave*, (1895) 2 Terr. L.R. 210.

Where after a portion of the work is done, the contract is abandoned by consent, the lien may be enforced upon a *quantum meruit*. *Powers v. Hogan*, 67 How. Pr. 255; s. c., 12 Daly 444.

Where a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract. *Royal Electric Co. v. City of Three Rivers*, (1894) 23 S.C.R. 289.

The defendant had agreed with the plaintiffs for the erection by them of a house on his land, and while engaged in such work the plaintiffs alleged unnecessary delays in their operations caused, as they said, by the neglect of the defendant in supplying material for the building, and in the course of a discussion the defendant told the plaintiff: "If you won't go on with your work, go away." Held, that this did not amount to a rescinding of the agreement, and that plaintiffs were not warranted in treating the agreement as abandoned by the defendant, who was entitled to counter-claim against the plaintiffs for the increased cost to him of finishing the building. *Clayton v. McConnell*, (1888) 15 A.R. 560. Any substantial variation from the contract must be waived or assented to by the "owner," as other-

wise the contract must be adhered to. *Clayton v. McConnell*, (1887) 14 O.R. 608.

A provision in a contract between the head contractor and a sub-contractor that the work shall be according to the architect's drawings and specifications, which are part of the contract, and that if any dispute arises as to their true construction and meaning the decision of the architect shall be final, does not make the architect an arbitrator to determine finally whether or not the work done by the sub-contractor has been performed in accordance with the contract. *Schillinger v. Arnott*, (1897) 152 N.Y. 584.

But in Massachusetts and New York it has been held in a number of cases that where the contractor has built in substantial compliance with the specifications he is entitled to maintain a lien. *Hayward v. Leonard*, (1829) 7 Pick. 181; *McCue v. Whitwell*, (1892) 156 Mass. 205; *Gillis v. Cobe*, (1901) 177 Mass. 584; *Norwood v. Lathrop*, (1901) 178 Mass. 208; *Homer v. Shaw*, (1900) 177 Mass. 1; *General Fire Extinguisher Co. v. Chaplin*, (1903) 183 Mass. 375; *Glacius v. Black*, (1872) 50 N.Y. 145; *Heckmann v. Pinkney*, (1880) 81 N.Y. 211; *Wright v. Roberts*, (1889) 118 N.Y. 672, affirming 43 Hun. 413; *Decker v. O'Brien*, (1889) 159 N.Y. 553.

In *Ringle v. Wallis Iron Works*, (1896) 149 N.Y. 439, it was held that substantial performance by the sub-contractor, unless waived or prevented by the owner or principal contractor, is a condition precedent to his right to payment and consequently to his right to lien.

It is not essential to the attaching of a lien that the labor for which a lien is claimed should be performed at the site of the building upon which the lien is claimed. *Daley v. Legate*, (1897) 169 Mass. 257. In that case the work was done in the workshop or yard of the contractor, but the work may be done in another city than that where the building is erected, the real question being whether the work done was intended for and went into the structure and was such as to be within the contemplation of the contracting parties. *Wilson v. Sleeper*, (1881) 131 Mass. 177; *Goddard v. Baine*, (1874) 115 Mass. 450; *Scannell v. Hub Brewing Co.*, (1901) 178 Mass. 288. In the last case cited, part of the labor upon the apparatus for a brewery situate in Boston was performed in the lien claimant's shop in Lowell and the final connecting of the various appliances by pipes in the



brewery may have been done by persons other than the lien claimant, nevertheless the lien was held to exist. Holmes, C.J., bases the judgment of the court on this point on the ground that the labor at Lowell was contemplated by the contract.

But where the work was merely sawing and planing lumber in the lien claimant's mill at the request of one who was erecting the buildings, there being no agreement that the lumber should be appropriated to said buildings, no lien attached to the buildings, although the lumber was used upon them. *Bennett v. Shackford*, (1865) 11 Allen (Mass.) 444.

An action was brought by a material man who supplied materials to the contractor for the work done by him for the owner. The work was done by the contractor, the defendant Bishop, under an agreement with the owner (the appellant) and the work contracted for was the erection and completion of two brick houses in Toronto. By the terms of the agreement the work was to be completed on, or before, the 14th August, 1902. The contractor proceeded with the work, but only a comparatively small part had been done on that date. The owner entered into new contracts with other tradesmen for the completion of the work, and it was completed by them at his expense. The official referee decided that the owner was not entitled to set off against the value of the work done by the contractor the difference between the actual cost to the owner of the work and the price he had agreed to pay to the contractor.

On appeal to the Divisional Court (Meredith, C.J., MacMahon, J., Teetzel, J.) that court held that it was a proper conclusion from the evidence that there was an unqualified and absolute refusal by the defendant Bishop to go on with and complete the work on his contract, after he had been more than once requested to do so, which evidenced an intention no longer to be bound by the contract and justified the appellant in proceeding to complete; and the appellant was therefore entitled to recover the damages sustained by him owing to the default of defendant Bishop in the performance of his agreement. These damages exceeded the amount found due to defendant Bishop.

The appeal was allowed with costs, and the judgment appealed from was set aside so far as it affected the appellant and the action as to him was dismissed with costs. *Ontario Paving Brick Co. v. Bishop*, (1904) 2 O.W.R. 1063, 4 O.W.R. 34.

Where a material man contracts to deliver material in a



manufactured form the contract is for materials only, and a lien cannot be had for labor performed in manufacturing the materials as a claim for labor. *Tracey v. Wetherell*, (1896) 165 Mass. 113; *Donaher v. Boston*, (1879) 126 Mass. 309.

The plaintiff, a builder, contracted to erect a building in Vancouver for the defendants, the contract providing that no extras would be allowed unless their value was agreed upon and endorsed on the contract. On the instructions of S., who intended to occupy the building for the purpose of a bottling company, of which he was a member, the plaintiff made alterations and additions, but no endorsement was made on the contract. Held, that such endorsement was a condition precedent to plaintiff's right to recover. *McKinnon v. Pabst Brewing Co.*, (1900) 8 B.C. 265; see also *Wood v. Stringer*, (1890) 20 O.R. 148.

(c). "*In respect of*," etc. As to the construction of this phrase in a statute, see *Brett v. Rogers*, (1897) 1 Q.B. 525; *Antil v. Godwin*, (1899) 15 Times Rep. 462. See also remarks of MacMahon, J., in *Davis v. Crown Point Mining Co.*, (1901) 3 O.L.R., at p. 69; *Woodruff v. Oswego Starch Factory*, 74 N.Y. Supp. 961, 963, 70 App. Div. 481; *Muzzey v. Reardon*, 57 N.H. 378.

#### MATERIALS.

(d). "*Places or furnishes any materials.*"—By sec. 2, sub-sec. 5, the word "materials" is defined to include every kind of movable property. In *Smith Co. v. Sissiboo Pulp & Paper Co.*, (1903) 36 N.S.R. 348; (affirmed), (1904) 35 S.C.R. 93, Mr. Justice Graham, in delivering the judgment of the court, referring to sec. 3, sub-sec. 1, of the Nova Scotia Mechanics' Lien Act, which is similar to sec. 4 of the Ontario Act, said (at p. 358): "The date of the contract for the materials is not the date of the commencement of the lien. It commences when the goods were placed or furnished. When were these goods placed or furnished? Now, I think it cannot be said as against the owner, that materials or machinery to be supplied under contract, not to the owner, but to a contractor by a sub-contractor, ought to be held to have been placed or furnished until they have reached the owner's property. His property is not enhanced in value by reason of a contract over which he has no control. But certainly not before they have reached this country."

In *Larkin v. Larkin*, (1900) 32 O.R. 80, it was held (Mere-

dith, C.J., dissenting), that there might be a lien on materials not incorporated in the building, but in that particular case there had been a conversion and the Act afforded no relief in such a case.

There is no lien if the debt ceases to be for "materials." Where "A." began to erect a building for "X.," but abandoned the work, and "B." agreed with "X." to complete it, and to pay all outstanding bills, "X." agreeing to pay a round sum for the whole work, including that already done by "A.," held, that "B." could maintain no lien for materials which he had furnished to "A.," for that debt was merged in the round sum to be paid by "X." *Whitney v. Joslin*, (1871) 108 Mass. 103.

Where a material man furnished money to a building contractor to purchase certain material which the material man did not have, he could not claim a lien for the amount so furnished. *Evans v. Lower*, (1904) 58 Atl. Rep. 294.

While the contractor who furnishes materials directly to the owner has a lien from the time he furnishes the materials, the sub-contractor does not acquire a lien until the materials are incorporated in the building. *Bunting v. Bell*, (1876) 23 Gr. 584. In *Hercules Powder Co. v. Knoxville L. & J.R. Co.*, (1904) 67 L.R.A. 487, it was held that if material is delivered in good faith to a sub-contractor, for use in the construction of a railroad, the material man is entitled to his lien therefor in the absence of definite proof that it was not used for that purpose.

In Pennsylvania it has been held that a mechanics' lien cannot be claimed for materials furnished for sidewalks (*Bradley Co. v. Gaghan*, (1904) 208 Pa. 511), and he has no lien for constructing a sidewalk in the street in front of the lots on which the lien is claimed. *Fleming v. Prudential Ins. Co.*, 73 Pac. Rep. 752. But in New York a lien has been maintained for the flagging laid on a sidewalk in front of the building. *Kenny v. Apgar*, (1883) 93 N.Y. 539; *Moran v. Chase*, (1873) 52 N.Y. 346. In Canada the lien Acts include work done upon the appurtenances to the building, and it would probably be held that a lien would lie on the building and land enjoyed therewith, for the construction of a sidewalk in the street adjoining the lot, where such sidewalk would be reasonably necessary for the use of the premises.

There is no lien for materials furnished on general account

and not for a specific building. *Hatch v. Coleman*, (1857) 29 Barb. 201.

Under the Ontario Act of 1873 a lien was claimed for materials furnished to contractor. Section 3 of that Act enacted that the lien attached upon the estate of the owner for an amount not greater than the sum payable by the owner to the contractor. Nothing was payable at the time the lien was filed, and it was held, therefore, that there was no lien. The lien is a creature of the statute and must be limited by its provisions. *Crone v. Struthers*, (1875) 22 Gr. 248. A recent Massachusetts case (*General Fire Extinguisher Co. v. Chaplin*, (1903) 183 Mass. 375), the facts in which are stated fully in Chapter III., *ante*, at p. 25, is in accord with the decision in this Ontario case.

In *McCormick v. Bullivant*, (1878) 14 C.L.J. 85, it was held that a lien for materials furnished by a sub-contractor must be enforced by proceedings begun within thirty days from furnishing. The lien in such a case, under the Act of 1874, arises from the doing or furnishing and not from the registration, as under the Act of 1873.

Materials furnished for the construction of a house on a specified lot cannot be the basis of a lien if used in building a house on another lot. *Boisot*, sec. 121. Where a lien claimant asserted three distinct liens, each against a different block of houses and made only one delivery of materials within the legal period, his lien would be preserved only as to the particular houses into which the material went, and not as to the entire property embraced in the contract. *Bradley Co. v. Gaghan*, (1904) 57 Atl. 985, 208 Pa. 511.

A material man who furnished materials to the contractor, and who contracts to finish the building after it has been abandoned by the contractor, thereby waives his lien for the said materials. *Whitney v. Joslin*, (1871) 108 Mass. 103.

Where part of a claim is for materials and part for labor, the particulars stated in the affidavit for lien being "the putting in bath tubs, wash tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, \$220," were held insufficient as including two classes (Davie, C.J., dissenting). *Weller v. Shupe*, (1897) 6 B.C.R. 58. Where the two classes of charges for labor and for materials are so mingled the contract being entire, that they cannot be determined respectively, there is no lien for either. *Gogin v. Walsh*, (1878) 124

Mass. 516; *Clark v. Kingsley*, (1864) 8 Allen (Mass.) 543; *Driscoll v. Hill*, (1865) 11 Allen (Mass.) 154.

Materials were supplied from day to day, nothing being said as to the particular building and no express contract. Held, that a lien may be registered at any time within thirty days from the supplying of the last item. Held, also, that, in the absence of appropriation, payment on running account may be credited on the first items and a lien may be claimed for the remaining items. *Lindop v. Martin*, (1883) 3 C.L.T. 312.

Where the price for the land and for the construction of the property are so mingled that the price of the latter cannot be ascertained, the contract not being severable, there can be no lien for the work. *Smith v. Sissiboo Pulp & Paper Co.*, (1903) 36 N.S.R. 348; (1904) 35 S.C.R. 93; see *Morrison v. Minot*, (1862) 5 Allen (Mass.) 403, 405, 406; *Mulrey v. Barrow*, (1865) 11 Allen (Mass.) 152; *Rathburn v. Hayford*, (1862) 5 Allen 406; *Weller v. Shupe*, (1897) 6 B.C.R. 58; *Ellenwood v. Burgess*, (1887) 144 Mass. 534.

A statement of claim did not disclose the kind of materials furnished. Held, defective, but as the lien is operative when registered and action brought and certificate of *lis pendens* registered, it was held that plaintiff's lien was not prejudiced. *Johnson v. Braden*, (1887) 1 B.C.R. (Pt. 2) p. 265.

Materials not actually used or delivered to a contractor are not "furnished" for the purpose of creating a sub-contractor's lien, although they were worthless for any other purpose and were prepared for the contractor under a contract which he broke by refusing to accept them. *Richmond & Irvine Construction Co. v. Richmond Ry. Co.*, (1895) 31 U.S. App. 704, 34 L.R.A. 625.

The British Columbia Mechanics' Lien Act of 1891, sec. 90, repealed all previous Acts. As it enacted no lien for materials no such lien existed. *Albion I. Works v. A.O.U.W.*, (1895) 5 B.C.R. 122, note.

In an action by a husband against his wife to enforce a lien, it appeared that defendant's mother and plaintiff's mother each owned a dwelling, both in one building, which was damaged by fire. Plaintiff contracted to repair both for a lump sum, being the amount of insurance which was on the building. Held, that amount due in respect to each dwelling might be separated and that plaintiff came within secs. 4 and 7 of the Ontario Act. *Booth v. Booth*, (1902) 3 O.L.R. 294. See Phillips, 3rd ed., sec.



374. *Deegan v. Kilpatrick*, (1900) 54 N.Y. App. Div. 374; *Miller v. Schmidt*, (1901) 67 N.Y. App. Supp. 628.

Under the Manitoba Act it has been held that a lien for materials only arises where the goods are supplied for the purpose of being used in the particular building on which the lien is claimed. *Sprague v. Besant*, (1885) 3 Man. 519.

An order for goods followed by the statement, "We have secured contract for hotel which requires above goods," was held to identify sufficiently the building to give the person who furnished the goods a lien. *Dominion Radiator Co. v. Cann*, (1904) 37 N.S.R. 237.

Explosives necessarily consumed in the use would be "materials" within this section. *Giant Powder Co. v. Oregon P. R.*, 8 L.R.A. 700, 42 Fed. 474; *Hazard Powder Co. v. Byrnes*, 21 How. Pr. 189; *Keystone Min. Co. v. Gallagher*, 5 Colo. 23. See also sec. 16, note (c) and sec. 22, note (b), *post*.

A lien for furnishing new material and replacing it in a bridge cannot be claimed by a sub-contractor whose employees by negligence had made the new work and material necessary. *Richmond & Irvine Construction Co. v. Richmond Ry. Co.*, (1895) 31 U.S. App. 704, 34 L.R.A. 625.

(e). "*To be used.*"—A material-man is not bound to show that his materials were used in the building; delivery upon the ground for the purpose of being used is sufficient (*McArthur v. Dewar*, (1885) 3 Man. 72), but a material-man has no lien unless the materials were supplied for the purpose of being used in the particular building upon which he claims to have a lien. *Sprague v. Besant*, (1885) 3 Man. 519. In the latter case, Taylor, J., said: "It will be observed the words are not 'materials used' or 'materials which have been used,' but 'materials to be used,' plainly implying that to give a lien to the person furnishing the material he must have supplied it for the purpose of being used in the particular building upon which he claims to have the lien." See, also, *Dominion Radiator Co. v. Cann*, (1904) 37 N.S.R. 237. It is not necessary that the materials should actually have formed a part of the structure. It is sufficient if their use was necessary and they were consumed in the making of the improvements. *Repauno Chemical Co. v. Greenfield*, 59 Mo. App. 6; *Hercules Powder Co. v. Knoxville L.*



& *J. R. Co.*, (1904) 67 L.R.A. 487. The test is whether the materials were necessary to the work of erection under the contract.

Whether the transaction was really materials furnished for a building or merely a sale of a chattel is mainly a question of fact. If it is shown that such chattels are so attached as to become part of the structure, and it was contemplated by the parties that they should be furnished, a lien may be enforced by furnishing them, or for work performed for attaching them. *La Grill v. Mallard*, 90 Cal. 373; *General Fire Extinguisher Co. v. Chaplin*, (1903) 183 Mass. 375. See *Bunting v. Bell*, (1876) 23 Gr. 588; *The Scottish American Investment Co. v. Sexton*, (1894) 26 O.R. 77.

There is no lien for unsuitable or unnecessary materials furnished, but not used. *Hunter v. Blanchard*, 18 Ill. 318; *Boyd v. Mole*, 9 Phila. 118.

(f). "*In the making, constructing, etc.*"—Making slight changes in a building, which work is merely incidental to the putting in of machinery which is personal property, will not give rise to a mechanics' lien, even under statutes allowing a lien for alterations and repairs. *Curnew v. Lee*, (1886) 143 Mass. 105.

Defendant employed contractor under a written contract to clear land for cultivation purposes. A laborer who worked for the contractor in clearing the land was held not entitled to a lien under sec. 4 of the British Columbia Act, as amended. *Black v. Hughes*, (1902) 22 C.L.T. 220.

Where the owner dismisses the contractor and arranges with a sub-contractor of the original "contractor" to finish the work, the sub-contractor is entitled to a lien as a "contractor" in respect to all work done after such arrangement. *Petrie v. Hunter*, 2 O.R. 233; 10 A.R. 127.

The lien does not extend to unliquidated damages due to the contractor from the owner on account of the violation of the terms of the contract. *Hoyt v. Miner*, 7 Hill (N.Y.) 525.

There can be no doubt that filling in and grading the earth about buildings already erected would be work giving a lien under this section. Even under a statute not so comprehensive in its terms it has been held that a mechanics' lien may exist for grading a lot, the test being whether it was reasonably necessary for the proper construction and occupation of a house. *Reid v. Berry*, (1901) 178 Mass. 260. See also *Perry v. Potashinski*, (1897) 169 Mass. 351.

Whether grading a lot on which a house is afterwards built, is done as part of the work of construction, so as to constitute a commencement of the building, is a question of fact depending on the circumstances of each particular case. Boisot, sec. 57, citing *Kelly v. Rosenstock*, 45 Md. 389.

The lien given for labor and materials furnished in respect to any structure or land includes hauling the materials there. *Fowler v. Pompelly*, (1903) 76 S.W. 173; *McClain v. Hutton*, 131 Cal. 132; *Hill v. Newman*, (1861) 80 Am. Dec. 473.

A contractor who has built two separate buildings on the same lot under two distinct contracts does not acquire a lien on the entire property for his entire account. *Currier v. Friedrich*, (1875) 22 Gr. 243. See *Oldfield v. Barbour*, 12 Pr. Rep. 554; *Fairclough v. Smith*, (1901) 13 Man. 509.

Commenting on the decision in *Currier v. Friedrich*, *supra*, Boisot says (sec. 174): "The reason given for the decisions from Massachusetts, Minnesota and Canada is that a mechanic cannot have a lien on one building for work done on another. But, as we have seen, this rule does not apply where both buildings are erected on the same lot, for the same owner, under one contract. It seems difficult to see why the fact that the work was done under two or more contracts between the same parties should make any difference." But it would be an extension of the terms of the statute to impose an incumbrance upon one property for work done upon another. Where there are two contracts they must be separated.

In *Fairclough v. Smith*, *supra*, the lien was registered against two lots of land owned by different persons in respect to work done upon two houses, one on each of the lots, on the order of one of the owners and for an amount claimed to be due for the work on both houses, without apportioning the amount as between the two. Killam, C.J., said: "I regret that I can devise no method to give effect to the claims asserted in this suit. It is impossible to find that the registered claims were sufficient to bind both lots held severally, and it seems equally impossible to give effect to them against one of the lots only for the proper amount. To choose one or the other to be bound would be wholly arbitrary." See also *Booth v. Booth*, (1902) 3 O.L.R. 294, cited, *post*, at p. 101; and *Orr v. Fuller*, (1899) 172 Mass. 597, referred to under sec. 17, *post*.

## LIEN FOR FIXTURES.

It is the general rule that furnaces, ranges, and heaters with their necessary attachments, put as permanent fixtures into a dwelling house in the course of its construction for purpose of sale, or rent, which fixtures are regarded by builders generally as essential parts of that class of houses, entitle the material-men to a lien therefor.

There is no lien on the realty for portable stoves or ranges. *Boston Furnace Co. v. Dimock*, (1893) 158 Mass. 552. A question frequently arises whether a chattel is so affixed as to be part of the structure and therefore subject to the lien upon realty. The test as applied by the Massachusetts Court is the question, What would pass as between vendor and vendee? In a recent case in Massachusetts (*Scannell v. Hub Brewing Co.*, (1901) 178 Mass. 288) it was held that a mechanics' lien upon realty may be established for labor performed in making in an entire contract for a round sum the apparatus and appliances for a brewery, to be inserted in the building and connected together by pipes, although part of the labor was performed in the lien claimant's shop in another city and the final connecting of the various appliances by pipes in the brewery may have been done by persons other than the lien claimant. Holmes, C.J., in referring to the question whether the labor furnished was performed in the erection of a building, said: "They were built up in the building and could not be got at except by taking them to pieces, which would seem, from the testimony of the respondent's witnesses, to be commercially impracticable. If any object was more movable than the others, it none the less was an integral part of one original whole, which, as a whole, was a building and real estate."

In another recent case (*Angier v. Bay State*, (1901) 178 Mass. 163) it was held that asbestos and magnesia covering, placed around steam piping in a distillery, intended as a permanent covering for the metal, may be found to be furnished in the erection of a building, within the meaning of the Massachusetts Lien Act. (See Appendix B.) Knowlton, J., said: "Although it was possible to remove it, the removal would greatly injure it, and it was procured to be retained as long as the pipes remained."

In New York it has been held that mirror frames annexed to

a house at the time it is built, and fitted into gaps left for that purpose in the walls, are fixtures for which a mechanics' lien may be maintained. *Ward v. Kilpatrick*, (1881) 85 N.Y. 417. See also *Union Stove Works v. Klingman*, 20 App. Div. 449, affirmed, 164 N.Y. (1900) 589. Chandeliers as distinguished from gas fittings are not the subject of a mechanics' lien, as they would not pass by a sale of the freehold. *Jarechi v. Society*, 79 Pa. St. 403. A mechanic furnished machinery to a tenant and attached it to the building on the leased premises, to be used by the tenant in manufacturing. Held, that the machinery was part of the leasehold, and that the mechanics' lien would attach to it. *Hart v. Iron Works*, 37 Ohio St. 75.

On this subject of "fixtures" see a large number of citations by Armour, C.J., in *Argles v. McMath*, (1895) 26 O.R. 224. See also the judgment of Sedgewick, J., in *Warner v. Don*, (1896) 26 S.C.R. 388, and the decision in *Stack v. T. Eaton Co.*, (1902) 4 O.L.R. 335.

Other cases dealing with various phases of this question are *Garing v. Hunt*, (1895) 27 O.R. 149; *Goldie, McCulloch Co. v. Hewson*, (1901) 35 N.B.R. 349; *Turner v. Wentworth*, (1896) 119 Mass. 459; *Scottish American Investment Co. v. Sexton*, (1894) 26 O.R. 77; *Kelly v. Border City Mills*, (1879) 126 Mass. 148; *Curnew v. Lee*, 143 Mass. 105; *Drew v. Mason*, 81 Ill. 498; *Bennett v. Shackford*, (1865) 93 Mass. 444; *Morse v. Ellis*, (1899) 172 Mass. 378; *General Fire Extinguisher Co. v. Chaplin*, (1903) 183 Mass. 375; *Michael v. Reeves*, 14 Colo. App. 460.

In a number of the above cases, machinery had been supplied and the test in such a case is the question whether the machinery by the manner of its attachment had become a permanent part of the building.

"Trade fixtures" are personalty and the security of the mechanic who constructs them is in the enforcement of his lien upon the chattel. *Carroll v. Shooting the Chutes Co.*, (1900) 85 Mo. App. 563. See *Ombony v. Jones*, (1889) 19 N.Y. 234.

(g). "Altering, improving or repairing."—See *Curnew v. Lee*, 143 Mass. 105, as to certain work on a building not constituting an alteration within the statute. See also construction of the word "repaired" as used in Workmen's Compensation Act, 1897. *Dredge v. Conway*, 70 L.J.K.B. 494, (1901) 2 K.B. 42, 84 L.T. 345.



(h). "*Shall by virtue thereof have a lien.*"—There are conflicting decisions upon the question whether a right to a lien arises where the work has been done on public buildings, such as school houses, which are not liable to sale in execution. Holmstead, at p. 30, refers to a decision of Proudfoot, J., in *Robb v. Woodstock School Board*, in which the right of lien was denied because such buildings are not liable to sale in execution. On the other hand, in *Moore v. Protestant School District of Bradley*, (1897) 5 Man. 49, Dubuc, J., held that a public school building was not exempt from the operation of the mechanics' lien law, the case of *Scott v. Burgess*, (1859) 19 U.C.Q.B. 28, being distinguished in this decision. The United States cases cited in that Manitoba case all adopt the view that public school houses are exempt and subsequent decisions there uphold that view. See *City of Salem v. Lane*, (1900) 90 Ill. App. 560, affirmed on appeal, (1901) 6 N.E. 37, in which case it was decided that the property of a municipal corporation cannot be sold to satisfy a mechanics' lien. In another Manitoba case (*McArthur v. Dewar*, (1885) 3 Man. 72), the test was stated to be whether such property is liable to sale under execution. In Massachusetts it has been decided that a school house held by a municipal corporation for public purposes is not subject to a mechanics' lien. *Lessard v. Revere*, (1898) 171 Mass. 294. See also *Staples v. Somerville*, (1900) 176 Mass. 237, 242. The ground of decision in the Massachusetts cases is that the buildings are held for a public use, and that it is against public policy in the absence of express provision to the contrary that the *instrumentalities for carrying on the government* should be the subject of seizure and sale for debt.

In a very recent case in Massachusetts (*Young v. Inhabitants of Falmouth*, (1903) 183 Mass. 80), it was held that a mechanics' lien could not be established upon a building erected for a free public library.

In Maine it was recently decided that a building erected by a town to be used as a public library is exempt from the operation of a mechanics' lien law. See *Goss v. Greenleaf*, (1904) 98 Me. 436.

On the other hand a church, not being public property, is not exempt. *Dewing v. Wilbraham Society*, (1859) 13 Gray 414; *Peabody v. Lynn Society*, (1863) 5 Allen (Mass.) 540.

In a case in Ontario (*Guest v. Hahnan*, (1895) 15 C.L.T. 61)



an application was made by a sub-contractor under the Act to simplify the procedure for enforcing mechanics' liens, 53 Vict. ch. 37, to determine whether the plaintiff was entitled to a lien upon a building known as "The House of Refuge," and the lands used and enjoyed therewith. This property was vested in the corporation of Hamilton, who erected the building "for public, beneficial and charitable purposes," and the Master held that the said house and lands were therefore of such a character as not to be liable to sale under execution, and consequently no lien attached.

It should be noted that the present Ontario Act, unlike the former Act, expressly includes municipal corporations as within the definition of "owner."

The general principles which should apply in considering this question whether a statute creates a mechanics' lien against property held by a municipal corporation are discussed with much ability in a New York case, *Leonard v. City of Brooklyn*, (1877) 71 N.Y. 498.

In that case it was held that no lien was enforceable against the property.

It should be stated, however, that the New York Lien Act after providing for instituting and prosecuting the lien action contains this further provision: "That such action shall be governed and the judgment thereon enforced in the same manner as upon issues joined and judgments rendered in all other such civil actions aforesaid." It was a natural conclusion, therefore, that the lien claimant was in no better position than an ordinary creditor against the municipal corporation. The judgment is referred to here because it states in the strongest form the reasons against creating a lien upon municipal property or recognizing it as created by implication, and in those provinces of Canada such as Nova Scotia, whose lien Acts contain no express reference to municipal corporations, this judgment would be of interest, particularly the concluding portion of it, which says: "To make such a material alteration the law should be plain, explicit and clear, and there is no ground for holding that it was the intention of the law makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express provision to that effect."

But special conditions apply to this question in the construc-

tion of the Ontario Statute. Under the former Ontario Mechanics' Lien Act it had been held that the lands of a railway company were exempt from the operation of that Act. *Breeze v. Midland Railway Co.*, (1879) 26 Gr. 225; *King v. Alford*, (1885) 9 O.R. 643. Section 4 of the present Act, however, includes "any . . . railway." Moreover, sec. 2, sub-sec. 3, includes "any . . . railway company," as within the definition of "owner," and sec. 17 (3) provides for the sufficiency of the description of lands where a lien is registered against the lands of a railway company. In *Giant Powder Co. v. Oregon Pacific Ry. Co.*, (1890) 8 L.R.A. 700, it was held that in a statute the general phrase "any other structure" following a specific enumeration of works declared to be subject to a lien for labor and materials such as a "building," "ditch," "flume" and "tunnel," included a railway, but this view would probably not be adopted in any court in Canada. As it had been judicially declared in a case under the former Ontario Act that railways were exempt from the operation of that Act on grounds of public policy any subsequent legislative intent to reverse that policy should be plainly and unmistakeably expressed. See remarks under sec. 7, note "railway."

As to railways under the control of the Dominion of Canada being affected by this provincial legislation, see *post* sec. 7 (1), note (c).

The court has no jurisdiction to enforce a lien out of its territorial jurisdiction. *Chadwick v. Hunter*, (1884) 1 Man. 363.

(i). "Upon the erection, building, etc., and the lands occupied thereby, or enjoyed therewith." It has been held in Pennsylvania (*Presbyterian Church v. Stetler*, 26 Penn. 246) that a destruction of the building for which the work has been done or the materials furnished, by fire, or otherwise, discharges the lien. Lewis, C.J., in delivering the opinion of the court in that case, said: "The equity of a mechanics' lien upon a building is founded upon the labor and materials furnished by him in constructing it. Attaching itself to the building, and depending upon it for existence, the lien must, necessarily, share the fate of the building. So, if the building, after erection, should be destroyed by accident, before the ground on which it stood passed to a purchaser, the lien would be gone. The reason for binding the land is gone, with the building." See also *Coddington v. Dry Dock*

*Co.*, (1863) 31 N.J.L. 477. But a recent decision in Missouri (*Hooven v. Featherstone*, (1901) 49 C.C.A. 229) holds that the lien continues attached to the real estate, notwithstanding the destruction of the building. See also to the same effect *Armigo v. Mountain Electric Co.*, (1902) 67 Pac. Rep. 726; *Smith v. Neubauer*, (1895) 33 L.R.A. 685. Under the lien Acts existing in Canada, it would probably be held that after the lien is acquired it will continue attached to the entire freehold, and the destruction of the building will not defeat it.

Where a lien on a mine was claimed in British Columbia, it appeared that none of the work was done and none of the materials were furnished on mining locations Nos. 128 and 129, but these were "enjoyed" with No. 258, on which the work was done, and it was held that the former locations were therefore subject to the lien. *Davies v. Crown Point M. Co.*, (1901) 3 O.L.R. 69.

As to the area of land subject to the lien, Fuller, C.J., in *Springer Land Association v. Ford*, (1897) 168 U.S. 513, said: "The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same."

(j). "Wharf."—A statute giving a lien on wharves "and other structures connected therewith" extends to all structures on, or connected with, a wharf. *Collins v. Drew*, (1876) 67 N.Y. 149.

The word "wharf" as used in two statutes in England (Factory and Workshops Act, 1895, sec. 23, and Workmen's Compensation Act, sec. 7) was held to include a floating structure carrying cranes for loading and unloading vessels, and which was moored in the River Thames, 500 feet from the shore by chains fastened to piles driven in the bed of the river. There was no connection with the shore except by boats. *Ellis v. Cory*, (1902) 1 K.B. 38. See also *Haddock v. Humphrey*, (1900) 1 Q.B. 609; *Kenny v. Harrison*, (1902) 2 K.B. 168.

Where the land is sold under execution, or otherwise, the lien is transferred to the proceeds. Phillips, secs. 196-8.

Under the Winding Up Act (R.S.C. ch. 129), sec. 62, the lien

is a preferential claim. *Re Empire Brewing and Malting Company*, (1891) 8 Man. 424. See *Re Ibx Co.*, (1902) 9 B.C. 557.

A private corporation cannot defeat a lien on the ground that the contract was *ultra vires*. *General Fire Extinguisher Co. v. Magee*, (1901) 49 Atl. Rep. 366.

There can be no lien on the property of a minor for work ordered by his guardian where the guardian had not obtained an order of the court authorizing him to have the work done. *Copley v. O'Neil*, (1869) 57 Barb. (N.Y.) 299; *Collins v. Martin*, (1877) 41 U.C.Q.B. 602.

(k). "*Limited, however, in amount.*"—In *Smith Co. v. Sissiboo Pulp & Paper Co.*, (1903) 36 N.S.R. 348; (affirmed, (1904) 35 S.C.R. 93) Mr. Justice Graham, in referring to sec. 3, sub-sec. 1 of the Nova Scotia Mechanics' Lien Act, which is similar to sec. 4 of the Ontario Act, said (at p. 358): "It is quite clear that, except where the owner has made payments contrary to the provisions of sec. 8"—(sec. 11 of Ontario Act)—"that is, either exceeding the 85 per cent. before the time limit, or within that amount after notice in writing of the lien, or which are not *bonâ fide*, a sub-contractor is not entitled to enforce his lien against the property for a greater amount than the amount due from the owner to the contractor. This is the effect of sec. 3, sub-sec. 1, last part"—(sec. 4 of the Ontario Act, last part)—"and secs. 6 and 7" (Ontario secs. 9 and 10). See *Briggs v. Lee*, (1880) 27 Gr. 464; secs. 13 (3); secs. 14 (1) and sec. 47. See also remarks of Bole, Co. J., in *Leroy v. Smith*, 8 B.C. 293, on similar words in corresponding section of British Columbia Act.

(l). "*Except as herein provided.*"—"Herein," i.e., by secs. 11, 14, 15.

This section (4) differs from sec. 4 in the British Columbia Act, and the decision in *Anderson v. Godsall*, (1900) 7 B.C.R. 404, would not apply to this or any section of the Ontario Act.

The lien is subject to the dower of the wife of the owner. *Van Vrouker v. Eastman*, (1843) 7 Met. 157, 161, 162; 20 Am. and Eng. Ency. of Law, 2nd ed., 486.

**5. Work done or materials furnished on lands of married women.**—Where work or service is done or materials are fur-



nished upon or in respect of the land of any married woman with the privity and consent of her husband he shall be conclusively presumed to be acting as well for himself and so as to bind his own interest, and also as the agent of such married woman for the purposes of this Act, unless the person doing such work or service or furnishing such materials shall have had actual notice to the contrary before doing such work or furnishing such materials. 59 V. c. 35, s. 3.

(a). "*Lands of any married woman.*"—Before this section was passed the separate property of a married woman only became subject to a mechanics' lien by virtue of a contract made by her or under authority express or implied. There was no presumption that the husband acted as the agent of the wife; the question of agency was one of fact to be determined from all the circumstances of the case. *Wagner v. Jefferson*, (1876) 37 U.C.Q.B. 551; *Kincaid v. Reid*, (1884) 7 O.R. 12. Knowledge by the wife that the work was being done on her property and silent acquiescence was not sufficient to make her property subject to the lien. See *West v. Sinclair*, (1892) 23 C.L.J. 119, 12 C.L.T. 44. In the absence of knowledge of or participation in a fraudulent intent on the part of the husband to improve his wife's property at the expense of his creditors, the wife's property was not liable for such improvements. To protect contractors and others in dealing with the husband when the property was the wife's separate estate this section was enacted. Instead of the claimant being compelled to prove the husband's authorization by the wife, he is now *conclusively presumed* to be acting as the agent of his wife, unless the claimant has actual notice to the contrary.

The contract, however, is the contract of the wife; hence, where the husband makes one contract for repairs to two houses, one belonging to his wife and the other to himself, a lien cannot be claimed against both properties for an amount due in respect to both houses without apportioning the same. *Fairclough v. Smith*, (1901) 13 Man. 509.

A husband may assert a lien upon the property of his wife for work or materials performed or supplied. *Booth v. Booth*, (1902) 3 O.L.R. 294.



Under this section a married woman will not be permitted to shew that her husband was not authorized by her to make the contract unless she can also shew that the contractor had actual notice of the absence of such authority.

A person contracting with the husband without actual notice that the husband was not authorized to make the contract may assert a mechanics' lien upon the interest of the wife in the property subject to the lien, as well as upon the interest of the husband.

Formerly a widow's dower was not affected by the lien of the mechanic unless the husband acquired the property after the lien had attached. *Schaeffer v. Weed*, 8 Ill. 513; *Gove v. Cather*, 23 Ill. 634; *Bishop v. Boyle*, 9 Ind. 169.

The lien may, probably, under this section be enforced against the widow's dower since the husband may bind his wife's estate or interest.

**6. Contracts not to deprive third party of lien.**—No agreement shall be held to deprive anyone otherwise entitled to a lien under this Act, and not a party to the agreement, of the benefit of the lien, but the lien shall attach, notwithstanding such agreement. 59 V. c. 35, s. 4.

(a). “*No agreement.*”—This section is to be read in connection with secs. 9, 10, 11 and 14, *post*.

Unless by the agreement the contractor forfeits all claim to payment in the event of a mechanics' lien being claimed or registered, it is difficult to understand how such an agreement could affect any persons but the parties to it and their representatives and assignees. The section in terms only applies to persons “otherwise entitled to a lien under the Act.” By secs. 4 and 9 the lien is limited to the sum payable by the owner to the contractor subject to the provisions of secs. 11 and 14 as to percentage to be retained. If, then, there is nothing due by the owner to the contractor there can be no lien and this section will not help the sub-contractor, unless it is held to mean that any such agreement, viz., that provides that nothing shall be due until completion, or that the right to payment shall be forfeited if any mechanics' lien is claimed or registered or otherwise takes

away the contractor's right to payment, shall not deprive the sub-contractor of the benefit of the lien. Such a construction would in effect be extending the provisions of the Act creating the lien, which this section does not purport to do. It is probable that the section does not go further than to preserve to sub-contractors and others not parties to the agreement the right to enforce their liens against the owner to the extent at least of the percentage to be retained, even though the owner has attempted to protect himself against liens by his agreement with the contractor.

Special provision is made in sec. 14 for wage-earners, and sec. 3, *supra*, enacts that any such agreement made by a "workman, servant, laborer, mechanic or other person employed in any kind of manual labor, intended to be dealt with in this Act," and who receives not more than three dollars a day, shall be null and void and of no effect.

In a building contract for the erection of a church the contractor agreed with the building committee to settle with all other persons doing work upon or furnishing materials for the construction thereof, and stipulated that neither he nor they should have any lien upon the building for their work or materials. Held binding on the sub-contractors, though made without their knowledge or assent. It was also stipulated that twenty per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the balance of the contract price so to be retained should not be payable until all sub-contractors were fully paid and settled with. Held, that no trust was thereby created in favour of the sub-contractors, as to the sum agreed to be retained; and, the contractor having assigned his interest in the contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid, that the assignee was entitled to receive the twenty per cent. retained, to the exclusion of the sub-contractors. *Forhan v. Lalonde*, (1880) 27 Gr. 600. See 47 Vict. ch. 18, sec. 1; 59 Vict. ch. 35, sec. 4.

**7. Property upon which lien shall attach.**—(1) The lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building, railway, land, wharf, pier, bulk-head, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct,

roadbed, way, fruit and ornamental trees and the appurtenances thereto, upon or in respect of which the work or service is performed, or the materials placed or furnished to be used, and the lands occupied thereby or enjoyed therewith.

2. **Where estate charged is leasehold.**—In cases where the estate or interest charged by the lien is leasehold the fee simple may also, with the consent of the owner thereof, be subject to the said lien, provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof, and duly verified.

3. **Prior mortgage.**—In case the land upon or in respect of which any work or service is performed, or upon or in respect of which materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien under this Act shall be entitled to rank upon such increased value in priority to the mortgage or other charge. 59 V. c. 35, s. 6 (1-3).

#### AMENDMENT OF 1901 (CHAPTER 12).

30. **Sec. 7, sub-sec. 1, amended.**—Sub-section 1 of sec. 7, of The Mechanics' and Wage-Earners' Lien Act is hereby amended by adding at the end of the said section the following words: "Provided, and it is hereby declared that nothing in this Act contained shall extend or be construed to extend to any public street or highway, or to any work or improvement done or caused to be done, by a municipality thereon."

(a). "*The lien, etc.*"—That is, every lien created by sec. 4, whether arising by virtue of the performance of work or services or the placing or furnishing of materials in the making or improving of any building, etc., upon such building, etc., for the price of such work, service or material, limited in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as to the percentage to be retained) by the

owner. This lien is now further limited to "the estate or interest of the owner as defined by this Act."

This section, read with sec. 4 and the definition of "owner" in sec. 2, gives the principal characteristics of a mechanics' lien. It arises by virtue of a contract, but may be claimed by persons not parties to that contract, as sub-contractors and laborers; the person against whom it is claimed must have some estate or interest in the property sought to be made subject to the lien; it is limited in amount both by the sum due the claimant and the amount owing by the owner; and it only binds the estate or interest of the owner, that is the person with whom a contract, express or implied, for the performance of the work or service or the placing or furnishing of the materials has been made. Subject to the limitations imposed by the Act every person who performs work or furnishes material in the carrying out of the contract has *pro tanto* a lien for the price thereof. There is nothing in the Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution, of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanics' lien is not analogous to a vendors' lien. *King v. Alford*, (1885) 9 O.R. 643. The mechanics' lien is the creature of the statute and must be limited by its provisions. This section applies to and qualifies all liens created by the Act. *Crone v. Struthers*, (1875) 22 Gr. 247.

The lien of a sub-contractor being limited to the amount owing by the owner attaches not only upon the property on which the work is done or materials furnished, but also upon the amount so due by the owner. The lien arises from the commencement of the work or the furnishing of materials, continues for thirty days without registry, and by registration for sixty days longer; at any time within those periods proceedings to enforce may be taken and *lis pendens* registered. See *Lang v. Gibson*, (1885) 21 C.L.J. 74. Compare *McCully v. Ross*, (1886) 22 C.L.J. 63, and 22 C.L.J. 75.

The lien is an interest in land. *Stewart v. Gesner*, (1881) 29 Gr. 329; *Ormsby v. Ottman*, (U.S.) 85 Fed. 492, 29 C.C.A. 295.

(b). "*Shall attach upon the estate or interest of the owner.*"—A further limitation of the lien is imposed by these words, and it was considered necessary to declare expressly that the defini-



tion of "owner" contained in *sec. 2*, is applicable. It follows, as an essential to the existence of a lien, that the person at whose request, and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit the work or service is performed or materials are placed or furnished should have some estate or interest in the land sought to be affected by the lien. If he has any estate or interest, however small, the lien attaches to the extent of that interest. Not only must he have an estate or interest, but the work, etc., must be done at his request. *Graham v. Williams*, (1885) 8 O.R. 478, on appeal, 9 O.R. 458; *Gearing v. Robinson*, (1900) 27 A.R. 364; *Webb v. Gage*, (1902) 1 O.W.R. 327; *Fairclough v. Smith*, (1901) 13 Man. 509. The contractor, workman or material man, must inquire as to the estate or interest of the employer in the land; he accepts the employment or supplies the materials at his own risk.

The lien attaches upon this estate or interest from the commencement of the work or service or from the commencement of the furnishing of materials. *Sec. 2 (3) ante*. In this respect the present differs from the preceding Act and from the present Manitoba Act, under which the lien attaches from the placing of the materials. See Manitoba Act, *sec. 4(a)*, *post*, p. 185; *Robock v. Peters*, (1900) 13 Man. 124.

The estate or interest which the owner has at that time is bound by the lien, and, if afterwards that estate or interest becomes less, the lien can still be asserted against the estate or interest he had at the time the lien attached. *Bank of Montreal v. Haffner*, (1884) 10 A.R. 573; *Keffer v. Miller*, (1890) 10 C.L.T. 90. In a Manitoba case (*In re Empire Brewing and Malting Co.*, (1891) 8 Man. 424) proceedings had been taken to enforce a mechanics' lien, after a winding-up order had been made. On an application to stay such proceedings it was held by Taylor, C.J., that the lien was not created by the taking of proceedings, but prior to that time, and prior to the winding-up, and that the proceedings could not be stayed. In a British Columbia case (*Re Ibex Mining & Development Co.*, (1902) 9 B.C.R. 557) mechanics' liens had been filed against the property of a company, and judgment recovered in respect to them in the County Court. On the same day as the judgment a winding-up order was made in the Supreme Court. Subsequently the liquidator obtained an order authorizing him to give a first charge on the property of the company in order to raise money to take out



certain Crown grants of property to which the company was entitled. The lien-holders had no notice of the application and did not appear on the hearing. They did not appeal from the order, but applied for leave to enforce their judgment in priority to the charge created by the liquidator under the order of court. Held, that the order made on the application of the liquidator was made without jurisdiction, and the lien-holders were not bound by it.

The converse of the above proposition, viz., that a larger estate or interest acquired after the attaching of the lien is bound by the lien, is not so clear. As a general rule the lien only attaches upon the estate or interest of the owner at the time the work or service is performed or the materials furnished. If, however, an owner having an equitable estate subjects that estate to a mechanics' lien and afterwards acquires the fee simple or other larger estate, such larger estate will be subject to the lien. The owner may be estopped from setting up the subsequent purchase in answer to the claim of the lien-holder. *Coleman v. Goodnow*, 36 Minn. 9, 29 N.W. 338. It seems clear that if the owner of an equitable estate afterwards acquires the legal title, a mechanics' lien, which became a charge upon the equitable estate, at once becomes a charge upon the legal estate as well. In that case the equitable estate becomes merged in the legal estate and the lien attaches to the latter. *Lyon v. McGuffey*, 4 Pa. St. 126; *Weaver v. Sheeler*, 124 Pa. St. 473; *Wolfe v. Oxnard*, 152 Pa. St. 623; *Bilyeau v. Gaule*, 1 Phila. (Pa.) 466; *McGraw v. Godfrey*, 56 N.Y. 610, 16 Abb. Prac. (N.S.) 358; *Hooker v. McGlone*, 42 Conn. 95. The most frequent instance of an equitable estate becoming chargeable is that of a purchaser under a contract which has not been fully completed, the purchaser not having acquired the legal title. Even then, if upon the completion of the contract the vendor takes a mortgage for the purchase money, it becomes a prior mortgage under the Act, and the vendor's interest in the property is only chargeable to the extent prescribed in sub-sec. (3). It is probable that though the contract is never carried out the lien-holder may assert his lien upon the increase in value against the vendor as if the relationship had been that of mortgagor and mortgagee. *Hoffstrom v. Stanley*, (1902) 14 Man. 227.

A mere possessory interest may be chargeable with a mechanics' lien and the lien may be registered and enforced against such an interest. *Christie v. Mead*, (1888) 8 C.L.T. 312. It is to be

remembered, however, that it is only such possessory interest that is affected, and the rights of other persons not parties to the proceedings are not affected. The interest of a person who is, upon the performance of prescribed conditions or otherwise, entitled to a grant of public lands, is an estate or interest within the meaning of the Act. *Turney v. Saunders*, 5 Ill. 527. Similarly the equitable estate of the holder of an option to purchase land may be the subject of a lien, and if in such a case the vendor induces contractors to go on with the work with general assurances that they will be paid, the estate of the vendor may also be bound. *Blight v. Ray*, (1893) 23 O.R. 415. Generally, however, only the interest of the purchaser will be affected. Defendant bought lands from one Townsend for \$1,200, and paid \$50 on account, balance to be payable immediately. Defendant took possession and erected a building and made improvements. Plaintiff supplied materials and claimed a lien against defendant and Townsend. Held, that the lien only extended to the equitable interest of defendant, and the claim against Townsend should be dismissed. *British Columbia Timber & Trading Co. v. Leberry*, (1902) 22 C.L.T. 273. In *Hoffstrom v. Stanley*, (1902) 14 Man. 227, the defendant agreed to purchase land from D. & McC. The price was to be paid 15th August, 1901, and in default D. & McC. could either cancel the agreement, in which event any payments made became forfeited, or could re-sell and recover any deficiency from defendant. No part of the purchase money was paid, but defendant made improvements on the land, work upon which went on after 15th August, 1901, with the knowledge and concurrence of D. & McC. Plaintiff was employed by defendant as carpenter and claimed a lien. Held, by Killam, J., that, having granted an extension, D. & McC. could not cancel the agreement without notice, and, therefore, the agreement was still subsisting when plaintiff did the work. The parties must be regarded as mortgagor and mortgagee, and plaintiff was entitled to a lien subject to the charge of D. & McC. for unpaid purchase money and interest. So the holder of a working option on a mineral claim was held in British Columbia to have an estate or interest against which a lien might be enforced and the interest of the person giving the option to purchase was not chargeable unless he had brought himself within the provisions of the Act. *Anderson v. Godsal*, (1900) 7 B.C.R. 404.

The question whether a lien can be created by a trustee against a trust estate depends upon the terms of the trust.

A contract for necessary repairs made with trustees to whom the land has been conveyed in trust "to secure and pay over the profits above and beyond all necessary expenses," will support a mechanics' lien (*Chatham v. Rowland*, 92 N.C. 340), but a contract with the trustee, who is only authorized to collect rents, for large and expensive improvements in excess of necessary repairs, would not entitle the contractor to a lien. *Boisot*, sec. 160; *Herbert v. Herbert*, 57 How. Prac. (N.Y.) 333. A trustee who is authorized to build may encumber the estate with a mechanics' lien. *Taylor v. Gilsdorf*, 74 Ill. 354.

A mechanics' lien attaches to the leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, and this, notwithstanding the removal of the buildings at the end of the term, is expressly required by the lease. *Zabriski v. Greater America Exposition Company*, (1903) 62 L.R.A. 369.

No lien attaches to the building unless the person with whom the contract is made has some interest or estate in the land on which it is situated. The lien is upon the realty with the building attached to the extent of the ownership of the one who contracted for the construction of the building and no further, and if there is no ownership there is no lien on either land or building. *Huff v. Jolly*, (1889) 41 Kan. 537. But see *Forbes v. Mosquito Fleet Yacht Club*, (1900) 175 Mass. 432.

Where a lease is forfeited for failure to pay rent the rent must be paid or tendered in order to give the holder of a lien for work done under a contract with the lessee a right to the lessee's interests. *Williams v. Vanderbilt*, (1893) 145 Ill. 238.

The word "interest" is the broadest term applicable to claims in or upon real estate, in its ordinary signification among the men of all classes. It is broad enough to include any right, title or estate in or a lien upon real estate. *Ormsby v. Ottman*, (U.S.) 85 Fed. 492, 29 C.C.A. 295.

In the case of a lessee, while the lien may be enforced against the interest of the lessee, sub-sec. (2) requires the consent of the lessor, in writing, signed by him upon the claim of lien before the fee simple can be charged.

In the United States it has been held in most cases that a person having only an oral contract of sale cannot charge the

property with a mechanic's lien, but when the oral contract has been subsequently completed by the execution and delivery of a deed it has been held in Massachusetts that the lien could be enforced. *Corbett v. Greenlaw*, (1874) 117 Mass. 168. See *Courtemanche v. Blackstone Valley St. Ry.*, (1898) 170 Mass. 50, where it was held that an interest under a parol agreement to purchase land is not enough to make one an owner, who can create a lien thereon.

If, as is probable, the mechanic's lien should be considered as a charge or mortgage created upon his interest or estate by the "owner," the principle applied in the case of a mortgagor who acquires the legal estate after the making of the mortgage would be applicable; the mortgagor is said to be estopped from denying his title.

The application of the principle of estoppel in such cases should, however, not be relied upon to too great an extent. The lien is, as has been pointed out, purely statutory, and is limited by the words of the statute. It extends only to the estate or interest of the "owner," that is, of the person who makes the contract, and it may well be argued that only the estate or interest at the time of the making of the contract is bound by the lien. The latter has been the doctrine generally adopted in the United States. Phillips, sec. 74.

The vendee in possession under a contract to purchase is considered an owner. *Courtemanche v. Blackstone Valley St. Ry. Co.*, (1898) 170 Mass. 50; *Currier v. Cummings*, (1885) 40 N.J. Eq. 145.

Fraud, misrepresentation or concealment will estop the owner of the fee from setting up his title in answer to the claim of the mechanic. He cannot take advantage of his own wrong to gain improvements on his property. So where a purchaser takes a conveyance to his wife in order to defeat a lien, or purchase property formerly owned by him and subject to a mechanics' lien, at a tax sale, the lien would be upheld. *Hooker v. McGlone*, 42 Conn. 95; *Schwartz v. Saunders*, 46 Ill. 18.

A mere instantaneous seisin is insufficient to sustain the lien. See *Owen v. Lynch*, (1876) 2 R. & C. 406. So where a purchaser under an agreement creates a lien upon his interest, and afterwards receives a deed and immediately executes a mortgage to the vendor for the whole or part of the purchase money, such mortgage takes priority to the lien except, perhaps, as to the in-



creased value under sub-sec. (3). *Ettridge v. Bassett*, (1884) 136 Mass. 314; *Saunders v. Bennett*, (1893) 160 Mass. 48; *Clarke v. Butler*, (1880) 32 N.J. Eq. 664; *McCree v. Campion*, 5 Phila. (Pa.) 9.

Whether a seisin is instantaneous must depend upon all the facts and circumstances of the case. If there is no dispute in regard to the facts the question whether a seisin is instantaneous is one of law for the court. If the facts are in dispute the question is for the jury under suitable instructions. A finding of a jury that a deed from A. to B. and a mortgage from B. to C. "were delivered simultaneously at the registry of deeds" on a certain day does not conclusively show that the deed and mortgage constituted parts of one transaction in which the seisin was instantaneous, and in the absence of a finding by the jury that the seisin was instantaneous it cannot be said to be so as a matter of law.

If in a suit to establish a mechanics' lien as against a mortgagee from A. it appeared that A. had only an instantaneous seisin of the land on which the lien was claimed, yet if it also appeared that A. falsely represented to the lien claimant that he was the owner of the land and thereby induced the lien claimant to enter into the contract under which his lien was claimed and the mortgagee when he took his mortgage knew of the lien claimant's claim of lien and also of the false representation and inducement, whether the mortgagee as well as A. would not be estopped from denying A.'s ownership of the land *quaere*. *Ettridge v. Bassett*, *supra*, distinguished. *Sprague v. Brown*, (1901) 178 Mass. 220.

See also *Osborne v. Barnes*, (1901) 179 Mass. 597; *Ready v. Pinkham*, (1902) 181 Mass. 351.

Section 13, sub-sec. 2 (*post*, p. 119) provides for the case where the conveyance has not been taken.

Though it is only the estate or interest of the owner as defined by the Act which can be sold to satisfy the lien, that estate or interest cannot be determined or surrendered by the owner thereof and thereby defeat the lien. The purchaser of that estate or interest becomes entitled to the rights of the former holder and may by compliance with the terms and conditions under which it was held claim and exercise the rights which such owner could have claimed and exercised. See cases cited under sec. 2, note (e).



A person for whom work is done on land under a contract may be an "owner" although without any legal or equitable title until the work is done, if he became the owner when the work was completed by virtue of its performance. *Bear Lake and R.W.W. Co. v. Garland*, (1896) 164 U.S. 1.

#### RAILWAYS.

(c). "*Railway.*"—Section 2, sub-sec. 3 provides that the word "owner" shall extend to and include a railway company. In Canada two classes of railways must be considered,—

(a). Railways constructed and in operation under provincial legislation and not declared by the Parliament of Canada to be for the general advantage of Canada;

(b). Railways between two or more provinces or extending beyond the limits of a province, and railways declared by Act of the Parliament of Canada to be for the general advantage of Canada.

(a). This class of railways is under the legislative jurisdiction of the provincial legislature and the question arises—Are such railways subject to mechanics' liens? In *King v. Alford*, (1885) 9 O.R. 643, it was held that a mechanics' lien could not be enforced against the lands of a railway company, the ground of the decision being that it was against public policy that railways, being essential to public use and convenience, should be liable to be cut in pieces and sold under legal process. (See judgment of Boyd, C., 9 O.R. at p. 647). Railway companies were, after this decision, included in the definition of "owner" and in 1897 (ch. 24, sec. 4) provision was made for the description of lands of a railway company. (This provision is now sec. 17, sub-sec. 3). The grounds of decision in *King v. Alford* remain as strong and as applicable now as before the amendments were made, and if possible such a construction would be given to these amendments as would prevent the operation of a railway from being interrupted. It may well be argued that these changes only extend the mechanics' lien to property of the railway company not necessary to the operation of the railway and that the lien can only be enforced against such property. It is to be noted also that the former Act used the word "person" in the definition of owner, and the word "person" under the Interpretation Act included corporations. (R.S.O. 1887, ch. 1, sec. 8, sub-sec.

13). It is questionable then whether the changes in the Act have affected materially the law as stated in *King v. Alford*, *supra*. In *Good v. Toronto H. & B. Railway Co.*, (1899) 26 A.R. 133, the lien was upheld, but this point was not raised.

(b). This class of railways is under the legislative jurisdiction of the Parliament of Canada, and it may be generally stated that the provincial legislation affecting such a railway is *ultra vires*. *C.P.R. Co. v. Notre Dame de Bonsecours*, (1899) A.C. 367; *Madden v. Nelson & Fort Sheppard Railway Co.*, (1899) A.C. 626; *Grand Trunk Railway Co. v. Therrien*, (1900) 30 S.C.R. 485; *The King v. C.P.R. Co.*, (1905) 9 Can. C.C. 328. The power of the provinces to legislate in respect to property and civil rights is subject to the power of the Parliament of Canada to legislate in respect to such railways; that power of the Parliament of Canada extends to property and civil rights as applied to railways within its legislative jurisdiction. *Vogel v. Grand Trunk Railway Co.*, (1884) 10 A.R. 102, 11 S.C.R. 612. As the mode of enforcing a mechanics' lien is by sale of the property, it seems that such a remedy against a Dominion railway could not be given by a provincial statute. See *Larsen v. Nelson & Fort Sheppard Railway Co.*, (1895) 4 B.C.R. 151. In *Canada Southern Railway Co. v. Jackson*, (1890) 17 S.C.R. 316, it was held that a provincial Workmen's Compensation Act was applicable to Dominion railway companies. That Act deals with the liability of the company and gives no remedy against the railway property; it trenches upon no Dominion legislation. When the Parliament of Canada legislates upon that subject in regard to Dominion railways, such legislation would, so far over-ride the provincial enactments. In Maine and Massachusetts workmen have a direct action against the railway company for work done on a railway though not directly employed by the company. Mass. L.R. ch. 111, secs. 164-168; Me. R.S., 1903, ch. 51, sec. 47; ch. 53, sec. 18. To this extent, it seems clear, a provincial legislature can impose liability on a Dominion railway company in the absence of Dominion legislation upon the same subject.

In *Ryder v. The King*, (1905) 9 Ex. C.R. 330; 41 C.L.J. 642, it was held that The Manitoba Workmen's Compensation Act does not apply to the Crown, the Crown not being mentioned therein.

(d). *Upon or in respect to which the work is performed.* The lien extends only to the property upon or in respect of

which the work is performed or the materials furnished to be used, and this being so, it follows that though the work is done under one contract and for the same owner, no lien is created upon one property for work done or materials furnished upon another distinct property. *Currier v. Friedrich*, (1875) 22 Gr. 243; *Oldfield v. Barbour*, (1888) 12 P.R. 544; *Larkins v. Blakeman*, 42 Conn. 292; *Rice v. Nantasket Co.*, (1870) 140 Mass. 256. If the amount for which the lien is claimed can be apportioned between two or more properties, or if separate prices are fixed, it seems a separate lien may be claimed on each property for the amount due in respect to it. *Booth v. Booth*, (1902) 3 O.L.R. 294; *Shaw v. Thompson*, (1870) 105 Mass. 345; but see *Fairclough v. Smith*, (1901) 13 Man. 509; *Rathbun v. Hayford*, (1862) 87 Mass. 406. In an action by a husband against a wife to enforce a lien, it appeared that defendant's wife and plaintiff's mother each owned a dwelling, both dwellings being in one building which was damaged by fire. Plaintiff contracted to repair both for a lump sum—the amount of insurance. Held, that the amounts due in respect to each dwelling might be separated and that plaintiff came within secs. 4 and 7 of the Act. *Booth v. Booth, supra*. Meredith, C.J., in this case said: "It was contended that as the agreement was made between the husband on the one part and his wife and mother on the other part for the performance of the whole work necessary to be done on both buildings for one entire price, the Act, R.S.O. 1897, ch. 153, gives no lien upon the land of either for the price of the work and material or any part of them. . . . It is unnecessary to express an opinion as to whether the respondent would have been entitled to a lien under the Act on both the lands of his wife and his mother for the whole of the agreed price, for the only claim which is made is a lien on the lands of the wife for the price of the work done on her part of the building and for the materials furnished in respect to it. It was, however, contended that the effect of the bargain, it having been for the whole work at one price and not at separate prices in respect to each building is that even such a lien as is claimed was not created. I am unable to agree with this view. Had it been impossible to distinguish between the work done and the materials furnished on the wife's building and those for the building of the mother there possibly might have been a difficulty in the respondent's way, but I see no reason why, if

it be practicable to do this, and *a fortiori* where, as appears to have been done in this case, a separate account had been kept, the lien may not attach to the land of each owner for the price of the work performed and materials furnished on his part of the building. . . . Though the price for the work and materials was a lump sum, and included what was to be paid for that which he contracted to do in respect to his mother's building, I see no reason why for the purposes of the Act the price may not be apportioned between the two buildings according to the amount of the work performed and the materials in respect of it."

Though the decisions are conflicting, in the United States a lien would be upheld in the majority of the States in cases where separate buildings are erected upon the same lot or contiguous lots, for the same owner under an entire contract. If the buildings are on separate lots, though erected under an entire contract with one owner, the lien is only for the work done or materials furnished on each particular lot. No lien arises if the lots on which the buildings are erected are owned by different persons, though erected under one contract. *Rathbun v. Hayford*, (1862) 87 Mass. 406; *Childs v. Anderson*, (1880) 128 Mass. 108. If, however, different owners join in the contract for the erection of one building on contiguous lots a lien may be claimed against the whole property. *Miller v. Sheppard*, 50 Minn. 268; *Menzel v. Tubbs*, 51 Minn. 364; *J. A. Treat Lumber Co. v. Warner*, 60 Wis. 183. No lien can be claimed where the work is done or the materials furnished partly upon land owned by the person for whom the work or materials is done or furnished and partly upon land of a stranger: *Stevens v. Lincoln*, (1874) 114 Mass. 476; *McGuinness v. Boyle*, (1878) 123 Mass. 570; unless the amount due in respect to the part owned by the person for whom the work was done can be shown. *Batchelder v. Hutchinson*, (1894) 161 Mass. 462.

There are also decisions in some States to the effect that a lien attaches on the land of both owners where a joint contract is made with them for the work to be performed on both lots which are owned separately. See *Deegan v. Kilpatrick*, (1900) 54 N.Y. App. Div. 374, 66 N.Y. Supp. 628; *Miller v. Schmitt*, (1901) 67 N.Y. Supp. 1077, and *Mixerell v. Guest*, (1895) 40 Pac. Rep. 1070.

In *Forbes v. Mosquito Fleet Yacht Club*, (1900) 175 Mass.



432, it was held that a mechanic's lien may be enforced upon a building erected by the lessee under a lease of the land for a term of years which requires the erection of the building and which prevents the building from becoming a part of the realty, and upon the lessee's estate for years in the land, for labor performed on the building by employees of the contractor with the lessee. In delivering the judgment of the court in this case Barker, J., said that it was intended by the Legislature to give a lien upon buildings the owner of which had no estate or interest in the land upon which the building was erected as well as upon any interest which the owner of the building might have in land on which it might be erected, and that the lien might extend to a building erected upon land although the building was personal property. The learned judge continues as follows: "The contrary opinion expressed in *Hayes v. Fessenden*, 106 Mass. 223, 231, and in *Stevens v. Lincoln*, 114 Mass. 476, 478, was not necessary to the decision of either of those cases and therefore is not binding as an authoritative construction of the statute. In neither of those cases was the building personal property. In the former it was put upon the land by one who had merely a written agreement with the owners of the land for its purchase, and the lien was denied for the sufficient reason that a person holding such an agreement merely could not charge the building with a lien, because he was not the owner of the building, under the authority of *Poor v. Oakman*, 104 Mass. 309. . . . So in *Stevens v. Lincoln*, where a lien was denied because by mistake a school house had been built partly upon lands of the town and partly upon lands of third persons, and it was not shown how much of the work was done on the respondent's land. There was no ground for contending that the building was personal property. So much of it as stood on land of other persons than the respondent was the real estate of those persons, and so much of it as stood on the respondent's land was the respondent's real estate; and the ground upon which the exceptions were sustained was that it could not be shown how much of the work was done upon the building on the respondent's land. In the present case the lease of the respondent required the erection of the building and so was a consent to its erection on the part of the owner of the land, and as the lease also gave to the respondent an estate for years in the land, this made the respondent the owner of



the building within the meaning of Pub. Sts. ch. 191, sec. 1, for the term of years at least."

Where a building is, by mistake, erected upon the wrong property, no lien can be claimed; thus where materials were furnished to be used in the erection of a building upon lot 3, but which was, by mistake, erected upon lot 4 and afterwards removed to lot 2, the material-man was not entitled to a lien upon lot 2. *Lingren v. Nilsen*, 52 N.W. 915, 50 Minn. 448.

A lien may be claimed on materials not incorporated in the building. *Larkin v. Larkin*, (1900) 32 O.R. 80. Where a contractor was to furnish the plant, etc., necessary for the carrying out of the contract, which was to become the property of the owner if the contract was not fulfilled, it was held that the value of the plant so furnished should not be included in the amount on which the owner was required to retain the percentage, though the contractor had failed to complete the contract and the plant had become the property of the owner. *Birkett v. Brewder*, (1902) 1 O.W.R. 62.

In *Webb v. Gage*, (1902) 1 O.W.R. 327, defendant leased premises to the Hoeffner Co. The company agreed to erect buildings and plant to the value of \$100,000, which were to become the property of defendant. Held, that the lien only attached to the company's interest.

(e). "*And the lands occupied thereby or enjoyed therewith.*"—Where a lien on a mine was claimed, and it appeared that none of the work was done and none of the materials were furnished on mining locations Nos. 128 and 129, but these were "enjoyed" with No. 258 on which the work was done, it was held that the former sections were therefore subject to the lien. *Davis v. Crown Point Mining Co.*, 3 O.L.R. 69.

See also remarks of Fuller, C.J., in *Springer Land Association v. Ford*, (1897) 168 U.S. 513, upon the principle of determination of the extent of land covered by a lien.

A lien upon a building also attaches upon so much of the adjoining land as is necessary for the use and enjoyment of the building for the purpose for which it was erected. *Nelson v. Campbell*, 28 Pa. St. 156; *Bank of Charleston v. Curtiss*, 18 Conn. 342. The extent of land covered depends on the circumstances of each case; thus a distinction is drawn between pro-

perty in the country and property in the city, a larger area being allowed in the former case.

See also cases cited under sec. 4, note i, *ante*.

(f). “*Where the estate or interest charged by the lien is leasehold.*” —The landlord’s interest only becomes subject to the lien where this sub-section is complied with. He may have been aware that the work was being done, the doing of the work may even have been one of the terms of the lease, yet his interest will not be affected by the lien unless by his own consent signified as provided. *Webb v. Gage*, (1902) 1 O.W.R. 327; *Graham v. Williams*, (1885) 8 O.R. 478, 9 O.R. 458; *Flack v. Jeffrey*, (1895) 10 Man. 514. It does not matter that the landlord becomes entitled to the benefit of the improvements. See *Birkett v. Brewder*, (1902) 1 O.W.R. 62. See also cases cited *ante* under sec. 2, note (e).

It follows also from this sub-section that a lien upon the landlord’s interest must be registered. The lien upon the tenant’s interest is good for thirty days without registry; here the consent must be signified at the time of registering the lien.

(g). “*Prior mortgage.*” —These words have been substituted for the words “encumbered by a mortgage or other charge existing or created before the commencement of the work or the placing of the materials or machinery.” It may be that the change has slightly restricted the meaning. A “prior mortgage” is a mortgage existing, though not necessarily registered at the time of the lien. *Cook v. Belshaw*, (1893) 23 O.R. 545. As a lien may be registered immediately after the contract is made, and before the performance of any work or the placing of any materials (see sec. 22), it would seem that a mortgage may be made before the commencement of the work or the placing of materials and not be a prior mortgage. The correct statement seems to be that the lien attaches at the time when the work is being performed or when the materials are placed, and, while it attaches as the work progresses, it relates back to the time when the contract was made. The distinction is not of much consequence since it has been held that, except in the case of actual notice, the lien may be defeated by prior registration of a conveyance, mortgage or other instrument. *Hynes v. Smith*, (1879) 27 Gr. 150; *Reinhart v. Shutt*, (1888) 15 O.R. 325; *Wanty v. Robins*, (1888) 15 O.R. 474; *West v. Sinclair*,

(1892) 28 C.L.J. 119, 12 C.L.T. 44; *McVean v. Tiffin*, (1885) 13 A.R. 1; *McNamara v. Kirkland*, (1891) 18 A.R. 271. Save as between rival lien-holders it is difficult to see how effect is to be given to sec. 21, which provides that "except as herein otherwise provided, The Registry Act shall not apply to any lien arising under this Act." It is probable that actual notice will in any event defeat prior registration. See *Rose v. Peterkin*, (1885) 13 S.C.R. 710, and remarks of Killam, J., in *Robock v. Peters*, (1900) 13 Man. 124, at p. 145.

A mortgage subsequent in point of time takes priority over an unregistered lien. *Cook v. Belshaw*, (1893) 23 O.R. 545. A mortgagee for future advances is also protected to the extent of all advances made before registry of the lien and before he had actual notice of the lien. *Ibid.*

It has been held that a mortgage, subsequent to a lien, but given for the purpose of paying off a prior incumbrance will be protected to the extent of such prior incumbrance. *Locke v. Locke*, (1898) 32 C.L.J. 332. In Massachusetts, under a similar provision, it has been held that a mortgagee, under a mortgage given to pay off existing mortgages, even to himself, acquires no rights under them. *Batchelder v. Hutchinson*, (1894) 161 Mass. 462; *Easton v. Brown*, (1898) 170 Mass. 311. See *Colonial Investment & Loan Co. v. McCrimmon*, (1905) 5 O.W.R. 315.

The lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials placed on the ground before the mortgage money was advanced. *Robock v. Peters*, (1900) 13 Man. 124.

In a suit in equity by a purchaser of land at a mortgagee's foreclosure sale against a lumber company and a plumber who had established mechanics' liens on the land, to restrain them from enforcing their orders of sale on the ground of the priority of the mortgage, it appeared that before the mortgage was executed and delivered the owner of the land having already built on other land certain houses and six-room cottages, for which he bought the lumber from the defendant company, went to the company's yard and said he wished to buy lumber to be used in building a six-room cottage on the land in question and that the company agreed to sell him the necessary lumber when he should want it, to be paid for at market prices, and the company estimated the cost of the lumber at about \$600; that on

the day before the mortgage was executed and three days before it was recorded the company had delivered under this arrangement enough lumber to complete the lower floor and most of the studding of the house, and six weeks later had delivered all of the material called for, and that they had been used in the construction of the house. As to the defendant plumber, it appeared that the price for the plumbing for the house was agreed upon, and was to include all labor and materials, that the materials were purchased and some work done with regard to sewer connections before the mortgage was made, and that the actual work of putting in the plumbing was begun two weeks after the execution of the mortgage, as soon as the condition of the building warranted it. Held, that assuming that it was open to the plaintiff to question the validity of the liens in these proceedings, the foregoing facts justified a finding that there was a contract with each of the defendants before the execution of the mortgage and that defendants' liens took precedence of the mortgage. *Taylor v. Springfield Lumber Co.*, (1901) 180 Mass. 3.

A mortgage is not a valid incumbrance upon after acquired land within the meaning of a lien law preserving the priority of valid incumbrances, when the mortgagor's title is acquired with the burden of the lien, which attached simultaneously with the vesting of title in him. *Bear Lake & R.W.W. & I. Co. v. Garland*, (1896) 164 U.S. 1. The fact that a mortgage including after acquired property was on record before any work was done by a contractor who claims a lien on the property does not subordinate his lien to the mortgage, if the mortgagor acquired his title burdened with the lien upon the completion of the work. *Ib.*

When a contract was made under which the contractor claimed a lien for labor, a bank held a valid mortgage for a certain sum on a portion of the premises upon which the lien was claimed. This mortgage was discharged and a new mortgage for a larger sum, of which the first sum formed a part, was taken by the bank. The land described in this mortgage was the land on which the lien was claimed. The balance of money of this mortgage was furnished subsequently by the bank to the mortgagor from time to time and was largely used by him in making payments to the contractor for work and materials furnished by him under the contract. The contractor



had no knowledge or reason to suppose that the mortgage of the bank existed until more than two years after its execution. Held, that the mortgage was not entitled to priority. *Easton v. Brown*, (1898) 170 Mass. 311.

The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor, who then conveyed the land in fee to the defendant owner, and having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money, but having actual notice of one of the liens and constructive notice of the other before making this payment, it was held that he could not have priority over either lien-holder for such advance. *Robock v. Peters*, (1900) 13 Man. 124.

A mortgage for money to be advanced for building purposes when put on record before any contract for building has priority over all liens for labor and materials subsequently supplied for the buildings. *Anglo-American S. & L. Assn. v. Campbell*, (1898) 43 L.R.A. 622.

(h). "*Upon such increased value.*"—Under the Mechanics' Lien Acts in some of the United States mechanics' liens are given priority over mortgages as to the building, but are postponed to prior mortgages as to the land; in some other States the Act gives the mortgage priority to the extent of the value of the land when the contract under which the lien arose was made. See *Wimberley v. Mayberry*, (1891) 94 Ala. 240, 14 L.R.A. 305; *Croskey v. N.W. Mfg. Co.*, 48 Ill. 481. The latter is in effect the same as the priority here given. While, however, the mechanics' lien only has priority over the mortgage to the extent of the increased value, yet if there is a surplus after satisfaction of the mortgage, the lien-holder may resort to it for satisfaction of the balance of his claim.

Unless the selling value of the property has been increased the lien has no priority over the mortgage. *Kennedy v. Haddow*, (1890) 19 O.R. 240. The lien, however, may be asserted subject to the prior rights of the mortgagee.

The mortgagee is a necessary party to any proceedings to enforce a lien against the increased value, and unless he is a party the premises must be sold subject to the mortgage. *Finn v. Miller*, (1889) 10 C.L.T. 23. In this case a mortgagee, not a



party to the proceedings, having sold under a power of sale in the mortgage, applied to have the registry of the lien and *lis pendens* vacated, and the order was made, the mortgagee to pay surplus proceeds into court, to be available for the lien-holders.

Several lien-holders may be entitled to share *pro rata* in this increased value. *Bank of Montreal v. Haffner*, (1882) 3 O.R. 183; *Broughton v. Smallpiece*, (1878) 25 Gr. 290.

The mortgagee should be made a party to the proceedings when a prior lien on account of increased value is claimed, and the statement of claim should set up such prior lien. *Douglas v. Chamberlain*, (1878) 25 Gr. 288; *Richards v. Chamberlain*, (1878) 25 Gr. 402. The onus is on the lien-holder to prove the amount by which the selling value of the property has been increased, and the decree should settle the amount and the priorities. *Croskey v. Corey*, 48 Ill. 442; *Croskey v. N.W. Mfg. Co.*, 48 Ill. 481; and see *Robock v. Peters*, (1900) 13 Man. 124. The same provisions as to the time within which proceedings must be taken against an owner apply to proceedings to enforce a lien against a prior mortgagee (*Bank of Montreal v. Haffner*, (1884) 10 A.R. 592; *Keffer v. Miller*, (1895) 10 C.L.T. 90), nor can the mortgage be added after the time has expired though the proceedings against the owner were commenced in time. *McDonald v. Wright*, (1868) 14 Gr. 284; *Keffer v. Miller*, *supra*; *Larkin v. Larkin*, (1900) 32 A.R. 80.

Where there is an actual agreement for the sale of the property, but no conveyance has been made, the purchaser is to be considered a mortgagor, and the vendor, a mortgagee. See sec. 13 (2); *Hoffstrom v. Stanley*, (1902) 14 Man. 227. It seems, however, that a tenant with an option of purchase is not to be considered a mortgagee, nor the landlord a mortgagor. *Graham v. Williams*, (1888) 9 O.R. 458; *Blight v. Ray*, (1893) 23 O.R. 415.

Where on a reference in a mechanics' lien proceeding under a former Act it was found as between a lien-holder and a prior mortgagee that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lien-holder who is declared entitled to rank on such increased value in priority to the mortgagee, and pending the proceedings the premises are destroyed by fire, the claim of the lien-holder is at end so far as the interests of the mortgagee are affected by it:—Sembler, the amount of the in-

creased value to which the lien-holder is entitled to resort as against the mortgagee cannot be ascertained until the property has been sold. *Patrick v. Walbourne*, (1896) 27 O.R. 221. Under sec. 8 of the present Act the insurance money stands in the place of the destroyed building.

**8. Application of insurance when lien attaches.**—Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall be subject to the claims of all persons for liens to the same extent as if such moneys were realized by a sale of such property in an action to enforce a lien. 59 V. c. 35, s. 7.

(a). “*Any insurance.*”—A lien-holder has an insurable interest in the building to which the lien attaches, though the lien is only inchoate. *Insurance Co. v. Stinson*, (1880) 103 U.S. 25. In *Greene v. Holmstead Fire Ins. Co.*, (1880) 82 N.Y. 517, a policy of insurance provided that the company should not be liable if without written consent thereon the property should thereafter be encumbered in any way. Subsequently to the issuing of the policy a mechanics' lien was filed against the property but no proceedings were ever taken to enforce the same. It was not shown that the plaintiff had knowledge of the filing of the lien until after the destruction of the property by fire. Held, that the filing of the lien did not create an incumbrance within the meaning of the condition and that the policy was not avoided thereby. The term “incumbrance” as used in an application for fire insurance relating to the incumbrance on the property should be construed to include a subsisting lien of a mechanic or material-man for which a claim had been filed. *Redman v. Phoenix Fire Ins. Co.*, (1881) 8 N.W. 226; 51 Wis. 293; 37 Am. Rep. 830.

Before this section was enacted the lien-holder had no right to enforce his lien against the proceeds of an insurance policy taken out by the owner or mortgagee. *Patrick v. Walbourne*, (1896) 27 O.R. 221. As to destruction of building in course of erection, see *Appleby v. Myers*, (1867) L.R. 2 C.P. 651, in which case Blackburn, J., says: “We think that where, as in the present

case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." See other cases on this point cited at p. 63, *ante*.

Under this section the lien is extended to the proceeds of fire insurance policies whether taken out by the owner, mortgagee or chargee. It should be noted, however, that in the case of a prior mortgagee the lien would extend only to the increased selling value of the property subject to lien. Section 7, sub-sec. 3. The person asserting the lien must establish the fact of such increased selling value before he can make any claim to insurance money payable to a prior mortgagee. The proceeds of fire insurance policies are now made to take the place of the property subject to the lien and are made available to the lien-holder. At the same time the lien-holder's right to proceed against the land is not taken away, so that he has his remedy both against the insurance money and the land. Only insurance against fire is mentioned in the section; destruction of the building from any other cause is not provided for.

**9. Limit of amount of lien.**—Save as herein provided the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. 59 V. c. 35, s. 8.

(a). "*Payable by the owner to the contractor.*"—This section is to be read with secs. 4, 11, 12, 14 and 15. Subject to the provisions of these sections as to the lien of wage-earners, the percentage to be retained, *bona fide* payments to lien-holders and payments made to defeat the lien, the owner can assert against the lien-holder the same defences as he can against the contractor. It was held in *Crone v. Struthers*, (1875) 22 Gr. 248, that as nothing was payable at the time the lien was claimed there was no lien, and that the lien being the creature of the statute must be limited by its provisions. Any condition or stipulation agreed upon between the owner and contractor, performance of which is a condition precedent to the contractor's right to recover from the owner may be set up by the owner in answer to a sub-contractor's claim to be entitled to a lien. The

usual case is non-fulfilment of the contract. *Appleby v. Myers*, (1867) L.R. 2 C.P. 651; *Thorn v. Mayor of London*, (1874) L.R. 10 Ex. 112; *Crone v. Struthers*, *supra*; *Goddard v. Coulson*, (1884) 10 A.R. 1; *Sherlock v. Powell*, (1899) 26 A.R. 407; *Dermott v. Jones*, (1864) 2 Wall. 1. But the owner may, by acceptance of the work or by other acts, waive a compliance with the contract. A certificate from the architect may be made a condition precedent to the contractor's right to recover, and though the contractor may set up in an action against the owner and architect that the certificate has been wrongfully and fraudulently withheld from him, it seems that the lien-holder cannot join the architect as defendant in proceedings to enforce the lien. *Bagshaw v. Johnson*, (1901) 3 O.L.R. 58. In *Good v. Toronto H. & B. Ry. Co.*, (1899) 26 A.R. 133, it was held that the rule that the contractor was bound by the provision of the contract making the decision of the engineer final did not extend to a case where the named engineer, while in fact the engineer of the employer, was described in the contract as the engineer of a third person. Fulfilment of the contract is not excused because the work cannot be completed according to the plans and specifications prescribed. See cases on these points cited under sec. 4, at p. 63.

See also *Smith Co. v. The Sissiboo Pulp & Paper Co.*, (1903) 36 N.S.R. 348; (1904) 35 S.C.R. 93.

#### 10. Limit of lien when claimed by some other than contractor.

—Save as herein provided where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been placed or furnished. 59 V. c. 35, s. 9.

(a). "*Limited to the amount.*"—This section is also to be read with secs. 4, 11, 12, 14 and 15, and deals with cases in which the lien is claimed by sub-contractors and others who do not contract directly with the owner. The lien claimed by a person performing work or furnishing materials for a sub-contractor is limited not only to the amount due by the owner to the contractor, but also to the amount due to the sub-contractor for



whom he has done work or service or furnished materials. All payments made *bona fide* up to the percentage mentioned in sec. 11, are protected unless notice in writing has been given by the person claiming the lien. Payments made to defeat or impair the lien are, by sec. 15, null and void to the extent of the sums improperly paid. *Briggs v. Lee*, (1880) 27 Gr. 464. Sections 9 and 10 are both subject to the provision of sec. 14 giving wage-earners a prior claim for thirty days' wages on the percentage retained under sec. 11.

There can be no claim as on a *quantum meruit* for the price of work actually done or materials actually supplied where the contract is an entire and indivisible one, and performance is a condition precedent. *Sherlock v. Powell*, (1899) 26 A.R. 407.

The amount due to a contractor or sub-contractor cannot be determined in proceedings to enforce the lien unless the parties liable on the contract or sub-contract are before the court. *Wood v. Stringer*, (1890) 20 O.R. 148.

**11. Percentage to be deducted and retained by owner for thirty days—Proviso.**—(1) In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise under the provisions of this Act shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section 4 of this Act, and such values shall be calculated on the basis of the price to be paid for the whole contract; Provided that where a contract exceeds \$15,000 the amount to be retained shall be fifteen per cent. instead of twenty per cent. and the liens created by this Act shall be a charge upon the amounts directed to be retained by this section in favor of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable. 60 V. c. 24, s. 2 (1).

**Payments made in good faith without notice of lien.**—(2) All payments up to eighty per cent. (or eighty-five per cent. where the contract price exceeds \$15,000) of such value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor before notice in writing of such lien given by the person claiming the lien to the owner, contractor or the sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act. 59 V. c. 35, s. 10 (2).

(3) Payment of the percentage required to be retained under sub-section 1 may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned in sub-section 1 unless in the meantime proceedings shall have been commenced under this Act to enforce any lien or charge against such percentage as provided by sections 23 and 24 of this Act. 60 V. c. 24, s. 2(2).

(a). “*Primarily liable.*”—This section is for the protection of sub-contractors. It creates a fund out of which persons claiming a lien under a contract not made directly with the owner may have their lien satisfied. Before the year 1882 the percentage to be retained was upon “the price to be paid to the contractor.” Under the former section it was held that the owner was not required to retain a percentage upon all payments made to the contractor. It was sufficient if such payments did not in the aggregate exceed the specified percentage of the whole contract price, and if the contractor failed to complete the contract, or if for any other reason the contract price never became due, there was no fund available to satisfy the liens of sub-contractors. *Goddard v. Coulson*, (1884) 10 A.R. 1; *Harrington v. Saunders*, (1887) 23 C.L.J. 48, 7 C.L.T. 88; *Truax v. Dixon*, (1889) 17 O.R. 366; *Reggin v. Manes*, (1892) 22 O.R. 443; *Re Sear and Woods*, (1892) 23 O.R. 474. In *Re Cornish*, (1884) 6 O.R. 259, it was held that where a contractor failed to complete his contract and his surety undertook to finish the work there were two contracts, and that the ten per cent.

was to be paid on the amount earned under each. It was also held that a mechanics' lien was postponed to the owner's claim for damages for non-completion; the priority of a wage-earner's lien was not decided. See *Harrington v. Saunders*, *supra*; *McBean v. Kinnear*, (1892) 23 O.R. 313.

As the law now stands, if any owner, contractor or sub-contractor under whom a lien may arise pays more than the specified percentage of the value of the work and materials done or furnished, he does so at his peril, and a lien may be successfully asserted against him, to the extent of the percentage which he should have retained, by any lien-holder who is prejudiced by the excessive payment. *Russell v. French*, (1896) 28 O.R. 215; *Dominion Radiator Co. and Cann*, (1904) 37 N.S.R. 237. In the last mentioned case the owner had no notice of any sub-contract and had failed to retain the fifteen per cent. for thirty days after completion of the contract. It was held that he must retain this percentage even where he had no notice of the sub-contract and that he had made the payments at his own peril if there were a sub-contractor in existence who was prejudiced by such payments. This case was distinguished from *Smith v. Sissiboo Pulp & Paper Co.*, (1903) 36 N.S.R. 348, (1904) 35 S.C.R. 93, on the ground that in the latter case payments had been made to the principal contractor in bonds and stock on completion of the principal contract in accordance with its terms and long before there were any sub-contractors in existence. There was therefore no retention required; the sub-contractor being held to have notice of the terms of the principal contract. The owner, contractor or sub-contractor must have always on hand for the specified period at least fifteen or twenty per cent., as the case may be, of the amount earned. See *Carroll v. McVicar*, (1905) 2 W.L.R. 25; 41 C.L.J. 668.

(b). "*Period of thirty days.*"—Section 22 limits the time within which a lien may be registered to within thirty days after the completion of the work or the supplying of the materials for which the lien is claimed. By retaining the percentage for the same period the owner, contractor or sub-contractor is in a position to know whether any lien will be asserted, the same limit of time being adopted in both instances.

The owner of a building is not prohibited from making payments before the expiry of the thirty days from completion out of the twenty per cent. reserve to persons entitled to liens, but

he makes such payments at his own risk as against anyone ultimately prejudiced by such payment. *Torrance v. Catchley*, (1900) 31 O.R. 546.

(c). "*Shall be a charge.*"—Under a former section where the contractor or sub-contractor never earned the contract price a sub-contractor had no lien or claim upon the percentage. See *Goddard v. Coulson*, (1884) 10 A.R. 1; *Harrington v. Saunders*, (1887) 23 C.L.J. 48, 7 C.L.T. 88; *Truax v. Dixon*, 17 O.R. 366; *Reggin v. Manes*, (1892) 22 O.R. 443; *Re Sear and Woods*, 23 O.R. 474. But under the Act as it now stands, as has been seen, these cases are no longer applicable, and the percentage is to be retained on the amount actually earned, even though the contractor fails to complete the contract. *Russell v. French*, (1896) 28 O.R. 215; and *Torrance v. Cratchley*, *supra*.

(d). "*Payments.*"—This word is here used not in its technical but in a popular sense. It covers a bill of exchange, promissory note, tri-partite agreement and payments directed by the contractor to be made to third parties. *Jennings v. Willis*, (1892) 22 O.R. 439. Also payments made by the owner or contractor to sub-contractors in order to obtain the delivery of goods or to get work done; it would be otherwise in the case of payments made to the assignee of the contractor. *McBean v. Kinnear*, (1892) 23 O.R. 313. Payments made to contractors or sub-contractors are only invalid when they would have been liable for the satisfaction of a lien. (*Ib.*) The percentage, payment of which is protected, is to be computed upon the value of the work actually done or materials furnished.

To defeat the effect of the statute the owner is allowed to show that payment has been made "without notice" of the lien of all that he became liable to pay. Hence the onus of showing payments which will extinguish the lien is upon the owner. The owner is entitled to be credited with the amount of promissory notes made by the contractor and endorsed by the owner which became due and were taken up as payments upon the building contract before the notice of lien was filed. It is not absolutely necessary that such notes should be charged up in the account. From the time the agreement is made to pay the notes, as well as from the time of their actual payment by the owner, he is entitled to have them treated as payments upon the



building contract existing between him and the contractor. *Smith v. Merriam*, (1873) 67 Barb. (N.Y.) 403.

The acceptance by the owner of an order drawn on him by the contractor for part of the moneys due upon the contract, which order was made payable to a sub-contractor who had filed a mechanics' lien for the amount represented thereby, and the owner's promise in writing to pay it, accepted by the sub-contractor in satisfaction of his lien which was thereupon discharged of record, constitutes a payment, and the filing of the order is not requisite in order to make it valid as against subsequent lien claimants. A provision requiring the filing of orders drawn by a contractor or sub-contractor upon the owner for moneys payable upon the contract does not affect payments made by the owner on account of labor performed or materials furnished under the contract. *Harvey v. Brewer*, (1904) 178 N.Y. App. 5.

(e). "*Notice in writing.*"—Payments to the extent of the percentage mentioned will not be protected if before payment is made notice in writing has been given by a person claiming a lien. The necessity for this provision is obvious as otherwise the owner before making any payment would always be obliged to make a search to ascertain if any lien had been registered. Only *bonâ fide* payments are protected. See sec. 15 as to the payments made for the purpose of defeating or impairing liens.

Lien claimants for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar Street buildings" to "see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made to-day." Held, Meredith, J., dissenting, a sufficient "notice in writing" of their lien. *Craig v. Cromwell*, (1900) 32 O.R. 27, affirmed, 27 A.R. 585. On the appeal in this case, at page 587, Osler, J.A., thus refers to the notice required by sub-sec. 2. of this section: "The object of the notice is to warn the owner that he cannot safely make payments on account of the contract price even within the 80 per cent. margin, because of the existence of liens of which he was not otherwise bound to inform himself or to look for. The notice does not compel him to pay the lien. It does not prove the existence of the lien. Its sole purpose is to stay the hand of the pay-

master until he shall be satisfied—either by the direction of the debtor or of the court in case proceedings are taken to realize the lien—that there is a lien, and that some amount is really due and owing to the lien-holder. . . . The notice under sec. 11, sub-sec. 2, is purely informal, and was manifestly intended to be so, no form or special particulars of detail being prescribed in regard that it might have to be given promptly or by illiterate persons who might, as it were, read and understand the sections as they ran.”

(f). “*May be validly made.*”—The payment of the percentage retained cannot be validly made to any person within the thirty days mentioned in sub-sec. 1. After the expiration of the thirty days payments may be validly made to lien-holders unless proceedings have been taken under secs. 23 and 24 to enforce a lien or charge against the percentage retained. Proceedings by one lien-holder would be sufficient as such proceedings would be available for other lien-holders claiming against the amount retained.

A mechanics' lien is postponed to the owner's claim for damages; as to a wage-earner's lien *quaere*.

In *Torrance v. Cratchley*, (1900) 31 O.R. 546, Street, J., in referring to the 11th and following sections says (at p. 549): “The only object of the provision requiring the owner to retain the twenty per cent. for thirty days appears to be that indicated by sub-sec. 3 of sec. 11, viz., to give persons entitled to liens an opportunity of enforcing them against the fund directed to be retained.”

## 12. Payments made direct by owner to persons entitled to lien.

—In case an owner or contractor chooses to make payments to any persons referred to in section 4 of this Act for or on account of any debts justly due to them for work or service done or for materials placed or furnished to be used as therein mentioned, and shall within three days afterwards give, by letter or otherwise, written notice of such payment to the contractor or his agent, or to the sub-contractor or his agent, as the case may be, such payments shall, as between the owner and the contractor, or as between the contractor and the sub-contractor, as the case

may be, be deemed to be payments to the contractor, or sub-contractor, as the case may be, on his contract generally, but not so as to affect the percentage to be retained by the owner, as provided by section 11 of this Act. 59 V. c. 35, s. 11.

In *Craig v. Cromwell*, (1900) 27 A.R., at p. 587, Osler, J.A., said: "Section 12 would appear to authorize him (the owner) to pay the sub-contractor, but if he does so he assumes the risk of being able to prove as between himself and the contractor, that the debt was justly due and his right or power to pay the sub-contractor does not depend upon notice having been given to him under sec. 11, sub-sec. 2.

In *Torrance v. Cratchley*, (1900) 31 O.R. 546, Street, J., referring to this section, said: "Section 12 of the Act was much urged upon as supporting the lien-holder's contention. That section appears, however, merely to give authority to the owner without the consent of the contractor, but upon mere notice to him to make payments out of the contract price direct to persons who would be entitled to liens, limiting, however, the right to make such payments to the moneys which the owner is not directed to retain under the 11th section. It does not apply at all to the moneys which the owner is directed to retain, and, therefore, it does not affect the present case."

**13. Priority of lien.**— 1. The lien created by the Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided.

**2. Agreements for purchase where part of purchase money unpaid.**—In case of an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance made to the purchaser, the purchaser shall, for the purposes of this Act and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee.

3. **Priority among lien-holders.**—Excepting where it is otherwise declared by this Act, no person entitled to a lien on any property, or to a charge on any moneys under this Act shall be entitled to any priority or preference over another person of the same class entitled to a lien or charge on such property or moneys under this Act, and each class of lien-holders, except where it is otherwise declared by this Act, shall rank *pari passu* for their several amounts, and the proceeds of any sale shall, subject as aforesaid, be distributed among them *pro rata* according to their several classes and rights. 59 V. c. 35, s. 12.

(a). “*Assignments, attachments, garnishments.*”—The conflicting views expressed in *Lang v. Gibson*, 21 C.L.J. 74; and *McCully v. Ross*, 22 C.L.J. 63, are disposed of by this section.

A sub-contractor commenced work on 19th August, 1903, and finished on 11th October, 1904, and registered his lien October 12th, 1904. Contractor gave an equitable assignment of amount due him 14th October, 1903, and notice was given to the owners. At that time \$2,588 had been earned, but was not payable until architect's certificate given 4th November, 1904. Held, under sec. 13 (1), that the lien was entitled to priority over the assignment, for the full amount of the lien and not merely for that portion thereof actually earned by the sub-contractor up to the date of the assignment. Under sec. 14 the sub-contractor's lien related back to the commencement of his work.

The assignment was valid and bound the debt assigned though it was not payable at the date of the assignment. The debt due and owing was a sufficient consideration for the assignment of a chose in action and the assignment was, therefore, not revocable or impeachable as being voluntary. *Ottawa Steel Castings Co. v. Dominion Supply Co.*, 5 O.W.R. 161, 41 C.L.J. 260.

(b). “*Advances made on account of any conveyance or mortgage,*” i.e., advances made on security of a mortgage registered prior to the lien. It is, therefore, necessary for the mortgagee to examine the registry for mechanics' liens on every occasion of making a fresh advance on the mortgage.

(c). “*The purchaser shall be deemed a mortgagor and the seller a mortgagee.*”—See reference to case of *Blight v. Ray*, 23 O.R. 415, under sec. 7, *ante*, at p. 95. See also *Hoffstrom v.*



*Stanley*, (1902) 14 Man. 227, 22 C.L.T. 337, cited under secs. 7 and 14.

(d). "*Excepting where it is otherwise declared.*"—The exception is that in favor of the liens for wages for thirty days or less. See sec. 14(1) as to the percentage to be retained, and sec. 11.

(e). "*According to their several classes and rights.*"—It had formerly been decided (*Goddard v. Coulson*, (1884) 10 A.R. 1; *Re Cornish*, (1884) 6 O.R. 259; and *Re Sear v. Woods*, 23 O.R. 474) that where a contractor never earned the percentage retained, a sub-contractor under him had no lien against the owner in respect to such percentage, but it was held in *Russell v. French*, 28 O.R. 215, that that percentage is liable for the claims of sub-contractors even though the contractor had not actually earned it. Meredith, C.J., said: "That percentage it was the duty of the owner to retain out of the payments to be made to the contractor, and it appears to have been intended to form a fund for the payment of the lien-holders, and not subject to be affected by the failure of the contractor to perform his contract." The three cases cited, *supra*, are, therefore, not applicable to the present Act.

As to effect of general assignment for the benefit of creditors upon mechanics' liens registered before the date of the assignment, see *In re Demaurez*, (1899) 5 Terr. L.R. 84.

**14. Priority of lien for wages.**—1. Every mechanic or laborer whose lien is for work done for wages shall, to the extent of thirty days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, of the contract price, directed to be retained by section 11 of this Act, to which the contractor or sub-contractor through whom such lien is derived is entitled, and all such mechanics and laborers shall rank thereon *pari passu*. 59 V. c. 35, s. 13 (1); 60 V. c. 24, s. 3.

**2. Enforcing lien in such cases.**—Every wage-earner shall be entitled to enforce a lien in respect of the contract not completely fulfilled.

3. **Calculating percentage when contract not fulfilled.**—In case of the contract not having been completely fulfilled when the lien is claimed by wage-earners, the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor or sub-contractor by whom such wage-earners are employed.

4. **Percentage not to be otherwise applied.**—Where the contractor or sub-contractor makes default in completing his contract the percentage aforesaid shall not, as against a wage-earner claiming a lien under this Act, be applied to the completion of the contract or for any other purpose by the owner or contractor, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim of any kind against the contractor or sub-contractor.

5. **Device to defeat priority of wage-earners.**—Every device by any owner, contractor, or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall, as respects such wage-earners, be null and void. 59 V. c. 35, s. 13 (2-5).

(a). "*Every wage-earner.*"—This sub-section is only meant to apply to wage-earners who are in the position of sub-contractors, and who are not themselves in default in respect to their own contracts.

Defendant agreed to purchase land from D. & McC., price to be paid 15th August, 1901. In default D. & McC. could either cancel agreement forfeiting any payments made or re-sell and recover any deficiency from defendant. Defendant made improvements on land and employed plaintiff as a carpenter. Plaintiff claimed lien for wages. No part of purchase money was paid. Work went on after 15th of August with concurrence of D. & McC. Held, that parties must be regarded as mortgagor and mortgagee. D. & McC. having granted extension could not cancel without giving more time, hence agreement was still subsisting when plaintiff did the work. Plaintiff was entitled to the lien subject to charge of D. & McC. for unpaid purchase

money and interest. *Hoffstrom v. Stanley*, (1902) 14 Man. 227, 22 C.L.T. 337.

(b). "*The percentage aforesaid*," i.e., the percentage referred to in sec. 11. See notes under sec. 11. Section 12 of the Manitoba Act is similar to this section, and in a very recent case (*Black v. Wiebe*, (1905) 1 W.L.R. 75), under that section, Perdue, J., said: "It is urged on behalf of the owner that as the house has never been completed there is nothing due to the contractors and that sub-contractors are, under sec. 8 of the Mechanics' and Wage-Earners' Lien Act"—(sec. 10 of the Ontario Act)—"limited to the amount owing to the contractors. Section 12 of the Act introduces special provisions for the protection of wage-earners and provides for the enforcement of the lien in their favor in respect to a contract not completely fulfilled. It also provides that in such cases the wage-earners may enforce their liens against the percentage required to be retained by the proprietor, and this percentage shall, in the case of a contract not completely fulfilled, be calculated on the work done or materials furnished by the contractor. The insertion in the Act of the provisions contained in sec. 12 shows that the protection extended to the lien-holder of giving him a right to enforce his lien derived through a contractor where the contractor has not fulfilled the contract is limited to claims for wages. Where, however, the money is payable under the contract by instalments as the work progresses the lien-holders may enforce their liens to the extent of the instalments earned in so far as the same remain unpaid in the hands of the proprietor. *Brydon v. Lutes*, (1891) 9 Man. 463."

**15. Payments made for purpose of defeating claim for lien.**—Nothing in this Act contained shall apply to make legal any payment made for the purpose of defeating or impairing a claim for a lien arising or existing under this Act, and all such payments shall be taken to be null and void. 59 V. c. 35, s. 14.

(a). "*Shall be taken to be null and void*."—Under a former Act it was held that payments were valid which were made to a contractor by an "owner," after registration of the lien of a sub-contractor, but without notice thereof or without any intention to impair the claim. *Briggs v. Lee*, (1880) 27 Gr. 464. Other

cases under the former Act touching this question of payments are: *Re Sear v. Woods*, (1892) 23 O.R. 474; *Jennings v. Willis*, (1892) 22 O.R. 439, and *McBean v. Kinnear*, (1892) 23 O.R. 313.

The question as to any payment being made for the "purpose" mentioned is a question which must be determined according to the special circumstances of each case and the burden of establishing the purpose or intent would be on the lien-holder.

See also *Ottawa Steel Castings Co. v. Dominion Supply Co.*, cited under sec. 13 (a).

While the contract remains in force no payment made to the contractor, after notice of lien has been filed by a sub-contractor, can affect the lien thereof (*McMillan v. Seneca Lake G. & W. Co.*, 12 N.Y. Supr. Ct. 12), and the owner cannot plead in defence to the lien any payments thereafter made by him. Boisot, sec. 367; *Morehouse v. Moulding*, 74 Ill. 322; *Budd v. Trustees*, (1888) 51 N.J. Law 36; *Anderson v. Huff*, (1892) 49 N.J. Eq. 349. After notice to the owner from a sub-contractor, the owner cannot rightfully pay the original contractor so as to defeat the demands of the sub-contractor, nor can he pay one sub-contractor in full, and another nothing, as his partiality may determine. Phillips, sec. 62-*(h)*; *Morehouse v. Moulding*, *supra*. As to payments made by collusion for the purpose of defeating other claimants see *Hofgesang v. Meyer*, 2 Abb. N. Cas. (N.Y.) 111.

Any legal assumption of liability by the owner on account of the contractor, such as the acceptance of an order for the payment of money, is equivalent to a payment, and has the same effect. *Gibson v. Lenane*, (1883) 94 N.Y. 183.

## 16. Restraining attempt to remove material affected by lien.

—1. During the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to the High Court, or to a judge or officer having power to try an action to realize a lien under this Act.

2. **Costs.**—The court, judge or officer to whom any such application is made, may make such order as to the costs of and incidental to the application and order as he deems just.



3. **Material furnished for certain purposes not to be subject to execution.**—When any material is actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 4 of this Act, the same shall not be subject to execution or other process to enforce any debt (other than for the purchase thereof) due by the person furnishing the same. 59 V. c. 35, s. 15.

(a) *During the continuance of a lien.*—The life of a lien is controlled by sec. 23 and sec. 24.

(b) *“Or to a judge or officer having power to try an action.”*—Section 33 mentions the officials having such power.

(c) *“Material.”*—This would include any plant or machinery or materials brought upon the land for the purpose of being used in the work upon the building (*Dixon v. La Farge*, 1 E.D. Smith, 722), or in blasting in order to lay the foundations of a building. *Hazard Powder Co. v. Byrnes*, 12 Abb. Pr. 469, s.c. 21 How. Pr. (N.Y.) 189; *Giant Powder Co. v. Oregon Pac. Ry. Co.*, 42 Fed. 470. Under a statute giving a lien for “timber or other materials used in or about the mine,” a lien lies for powder, steel and candles furnished for the use of the mine. *Keystone Min. Co. v. Gallagher*, 5 Col. 23; *California Powder Works v. Blue Tent & Mines*, 22 Pac. Rep. 391. See also cases cited under sec. 4, *ante*, at p. 78, and section 22, note (b).

(d) *“Due by the person furnishing the same.”*—These words should be read in connection with the words “any debt” in subsec. 3. They refer only to persons furnishing or procuring materials in pursuance of the provisions of sec. 4. See secs. 4 and 13.

17. **Registration of claim for lien.** Rev. Stat. c. 138.—1. A claim for lien applicable to the case may be registered in the registry office of the registry division or where the land is registered under *The Land Titles Act* in the land titles office of the locality in which the land is situated, and shall set out:—

(a) **Contents of claim of lien.**—The name and residence of the person claiming the lien and of the owner of the property to be

charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property to be charged) and of the person for whom and upon whose credit the work (or service) was or is to be done, or materials furnished or placed, and the time or period within which the same was, or was to be, done or furnished or placed;

(b) A short description of the work (or service) done or materials furnished or placed or to be furnished or placed;

(c) The sum claimed as due or to become due; 59 V. c. 35, s. 16 (1 *a-c*).

(d) **Rev. Stat. c. 138.**—A description of the land to be charged sufficient for the purpose of registration, and where the land is registered under the Land Titles Act such claim shall also contain a reference to the number of the parcel of the land and to the register in which such land is registered in the land titles office.

(e) The date of expiry of the period of credit (if any) agreed by the lien-holder for payment for his work (or service) or materials where credit has been given.

(2) **Form of claim.**—The claim may be in one of the forms given in the Schedule to this Act, and shall be verified by the affidavit of the person claiming the lien or of his agent or assignee having a personal knowledge of the matters required to be verified and the affidavit of the agent or assignee shall state that he has such knowledge. R.S.O. 1887, c. 116, s. 55; 59 V. c. 35, s. 16.

(3) **Description of lands where lien registered against railway.**—When it is desired to register a claim for lien against the lands of a railway company, it shall be a sufficient description of such lands to describe them as the lands of such railway company, and every such claim for lien shall be registered in the general registry in the registry office for the registration district where such claim is claimed to have arisen. 60 V. c. 24, s. 4.

(a) "*May be registered.*"—The registration does not create the lien, but is necessary to keep it alive after thirty days from the completion of the work or the furnishing of the materials. See in this connection sections 22, 23, 24 and 28 and cases cited.

As to registration being necessary to charge the interest of a lessor, see *ante*, notes under section 7 (2), p. 92.

A lien may be registered and enforced against a mere possessory interest. *Christie v. Mead*, (1888) 8 C.L.T. 312.

Where G. claimed a lien in respect to materials furnished by virtue of an assignment from the original furnisher thereof: Held, that "G" had a right to register a claim for the same, but the affidavit of verification required by section 4, sub-section 2, must be made by himself and not by the assignor. *Grant v. Dunn*, (1883) 3 O.R. 376.

A claim may be registered by the assignee of the person doing the work or furnishing the materials. See sub-section 2 of this section and also section 26.

Constructive notice of lien is not sufficient to postpone a mortgage taken subsequent to the contract but registered prior to the registry of the lien. Notice must be actual. Knowledge of the existence of the contract is not sufficient notice. *West v. Sinclair*, (1892) 12 C.L.T. 44; 28 C.L.J. 119.

As to the application of the Registry Act to liens, see *Wanty v. Robins*, (1888) 15 O.R. 474; *Rose v. Peterkin*, (1885) 13 S.C.R. 677; *McNamara v. Kirkland*, (1891) 18 A.R. 271; *Miller v. Dugan*, (1890) 23 N.S.R. 120; (1892) 21 S.C.R. 33.

There was no evidence that plaintiff had notice of contract under which defendant, Roy, claimed title, and her conveyance was registered after registry of *lis pendens* in present action. Held, that she need not have been joined as defendant as she took subject to the proceedings in the action. *Fraser v. Griffiths*, (1902) 1 O.W.R. 141.

A lien-holder claiming priority against a prior registered mortgagee or grantee should make such a party an original defendant and the grounds of the claim should be stated. *Reinhart v. Shutt*, (1888) 15 O.R. 325.

A claimant who files a claim for lien does not thereby waive any other right he may have against his debtor in respect to the claim. *Dunn v. Stokern*, (1885) 43 N.J. Eq. 401; *Cremier v. Byrnes*, 4 E. D. Smith (N.Y.) 756.

(b) "*The name and residence.*"—Plaintiffs were day laborers who did work for defendants in Rainy River District and say they resided in that district. Held, that the statutory act which gives vitality to the lien is its due registration and this may be effected by affidavit of an agent or assignee. The Act allows wage-earners (section 32) to group themselves as litigants, and as all are within the limits of the district and the address of the solicitor is given, the action should not be stayed. *Crerar v. C. P. R.*, (1903) 5 O.L.R. 383. "Objection is taken to the description of the residence of the claimant, which should state in what part of the town of Minnedosa he resides, but I hold that when he describes himself as of the town of Minnedosa it is quite sufficient." *Irwin v. Beynon*, (1886) 4 Man. 10, *per* Dubuc, J. See also *Anderson v. Godsall*, (1900) 7 B.C.R. 404, where it is stated that the rule which might apply to a large city as to giving the street and number of the residence would not apply to small towns and villages. See also similar remarks by Boyd, C., in *Crerar v. C. P. R. Co.*, (1903) 5 O.L.R. 383; 2 C.L.R. 107.

Under a former Act it was held that the remedy of the lienholder is against the increased value of the premises and the lienholder cannot question the validity of a mortgage.

The name of the town and county in which the lienholder resides was held a sufficient address under 56 Vict. ch. 24, sec. 11. The Act only authorized "proceedings to enforce the lien," and the *bona fides* of a mortgage cannot be brought up and decided in such proceedings. *Dufton v. Horning*, (1895) 31 C.L.J. 281; 26 O.R. 252.

(c) "*Of the owner of the property to be charged.*"—Work was commenced by contractor on 31st December, 1877. Two mortgages were recorded on the 31st May and 8th June respectively. Contractor afterwards registered lien and began action on 28th August, 1878. The Master held that the mortgagees were prior incumbrancers and refused to make them parties. Judgment affirmed. *Hynes v. Smith*, (1879) 15 C.L.J. 136. In *Irwin v. Beynon*, *supra*, Dubuc, J., said: "It is also argued that the statement of claim does not sufficiently state who is the reputed owner and also the person for whom the work was done. The statement of claim registered states that the plaintiff claims a lien upon the estate of G. W. Beynon, barrister-at-law. I think this is sufficient and it is also in accordance with the form given in the Ontario Statute."



(d) "*The land is situated.*"—Where the land affected by the lien is partly in one registration division and partly in another, the registration should be made in both divisions. See *Arkansas River L. R. & C. Co. v. Flinn*, 33 Pac. 1006; 3 Colo. App. 381. As to the area of land subject to the lien, see *Springer Land Association v. Ford*, (1897) 168 U.S. 513; *Whalen v. Collins*, (1895) 164 Mass. 147. The latter case decides that the statute does not authorize the holder of a lien at his own option to enforce it upon a part only of the land subject to the lien. The question as to whether the whole or only a part of such land shall be sold is for the court. See also on this point, *Pollock v. Morrison*, (1900) 176 Mass. 83.

(e) "*The sum claimed as due.*"—As between the parties the fact that the lien is claimed for a greater sum than is actually owing does not vitiate the claim when honestly made. *Springer Land Association v. Ford*, (1897) 168 U.S. 513; *Kendall v. Fader*, (1901) 199 Ill. 294. But when a party inserts in a notice of lien statements of fact which are not only untrue, but are wilfully and intentionally false in some important respect he thereby forfeits the right to a lien and renders the notice void or ineffectual. *Aeschlimann v. Presbyterian Hospital*, (1901) 165 N. Y. App. 296. A very large number of cases are reviewed in this case.

(f) "*Owner.*"—See notes under section 2, sub-section 3, and section 7. See also *De Klyn v. Gould*, (1901) 165 N.Y. App. 282.

(g) "*Of the person for whom and upon whose credit the work or service was or is to be done.*"—In a case under the former Act (*Wallis v. Skain*, (1892) 21 O.R. 532) it was held that the omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work is done or materials furnished is fatal to the lien. But see section 19.

(h) "*And the time.*"—Under the British Columbia Mechanics' Lien Act it was held that a miner may enforce a lien against a mineral claim and that an affidavit stating that work finished or discontinued "on or about" a stated date was sufficient. *Holden v. Bright Prospects G. M. Co.*, (1893) 6 B.C.R. 439.

In *Flack v. Jeffrey*, (1895) 10 Man. 514, the lien as filed stated that the work was commenced on a certain day and that it was fin-

ished *on or before* a certain other day. Held, following *Truax v. Dixon*, 17 O.R. 356, and in view of the Manitoba Interpretation Act, that the statement was sufficient.

(i) "*Description of the land to be charged.*"—The description need not be strictly accurate. In *Cleverley v. Moseley*, (1889) 148 Mass. 280, a very inaccurate description was held sufficient. "A description is sufficient which will enable one who is familiar with the locality to identify the land with reasonable certainty." *Dodge v. Hall*, (1897) 168 Mass. 435. See also *Pollock v. Morrison*. (1900) 176 Mass. 83; 177 Mass. 412.

As illustrating an inaccurate but sufficient description and an insufficient description, compare *York v. Barstow*, (1900) 175 Mass. 167 and *Muto v. Smith*, (1900) 175 Mass. 175. See also for sufficient description, *Christie v. Mead*, (1888) 8 C.L.T. 312, cited under section 7. In *Orr v. Fuller*, (1889) 172 Mass. 597, it was held that the fact that the work was done and the materials were furnished in the erection of several houses under one contract with the owner of a tract of land which had no visible division warrants a finding, if not a ruling, that the whole tract is one lot and that there is a mechanics' lien upon the whole of it for the whole sum due.

(j) "*Verified by the affidavit.*"—For form of affidavit see the schedule to this Act. As to immaterial defect see *Currier v. Friedrick*, (1875) 22 Gr. 243. An affidavit attached to a lien was sworn before a person who afterwards became plaintiff's solicitor, whereupon objection was raised to the affidavit. The objection was over-ruled. *Elliott v. McCollum*, (1899) 19 C.L.T. 412. *Vernon v. Cooke*, 49 L.J.C.P. 767, followed; *Baker v. Ambrose*, (1896) 2 Q.B. 372, distinguished.

As to who is authorized to take the affidavit, see R.S.O. ch. 74, sec. 12; *Truax v. Dixon*, 25 C.L.J. 249; R.S.O. ch. 175, sub-secs. 3 and 4; *Canada Permanent Loan & Savings Co. v. Todd*, 22 O.R. 515. Cf. *Baker v. Ambrose*, (1896) 2 Q.B. 372.

The particulars of claim in an affidavit for a lien were: "The putting in bath-tubs, wash-tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, \$220." Part was for material and part for labor. It was held, Davie, C.J., dissenting, that the statement was fatally defective, as including two classes, in regard to one of which there was no statutory lien. Davie, C.J., was of opinion that the particulars

were sufficient and that the separation of the price of the labor from that of the material was a function of the court exerciseable at the trial. *Weller v. Shupe*, (1897) 6 B.C.R. 58.

In another case the particulars for lien were: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described for which I claim the balance of \$123." Held, insufficient. *Knott v. Cline*, (1896) 5 B.C.R. 120. See also *Johnson v. Braden*, 1 B.C.R., Pt. 2, p. 265; *Gogan v. Walsh*, (1878) 124 Mass. 516; *Clarke v. Kingsley*, (1864) 8 Allen (Mass.) 543.

A notice of lien alleging an agreement to furnish the plumbing for a dwelling house, stable and gardener's cottage for a certain sum and that the lien claimants had furnished certain of the materials and had done a portion of the work, but failing to state how much of the agreement had been performed or the value thereof, is fatally defective. *White v. Livingstone*, 69 App. Div. 361; (1903) 174 N.Y. 538.

A claim is not insufficient because it fails to set forth the plans and specifications which are made part of an alleged contract. *Oriental Hotel Co. v. Griffiths*, (1895) 30 L.R.A. 765.

A notice which fails to state the kind or amount of labor performed or materials furnished by the lien claimant is invalid. *Toop v. Smith* (1905), 181 N.Y. 283.

(k) "*Or of his agent.*"—In a recent New York case, even where these words were omitted, it was held that the affidavit of an agent was sufficient. *McDonald v. Mayor of New York*, (1902) 170 N.Y. App. 409. But without these words in a former Ontario Act the affidavit of an agent was held insufficient. *Grant v. Dunn*, (1883) 3 O.R. 376.

See remarks on liens against railway property, *supra*, under section 7, at p. 99.

**18. What may be included in claim.**—A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in section 17 of this Act. 59 V. c. 35, s. 17.

(a) "*Any number of properties.*"—In other words, one claim of lien for registration may include work done or materials furn-

ished in respect to different properties of the same owner. *Halstead & Harmount Co. v. Arick*, (1904) 76 Conn. 382.

The policy of the mechanics' lien law is to make every building and the lot on which it is erected liable to the lien for work done upon it and for materials furnished for the erection and construction of the building. Where a number of buildings are erected under a single contract upon contiguous lands the statute does not contemplate that there should be a separate and distinct lien claim filed for each one of the buildings. It recognizes but a single lien. *Johnson v. Algor*, (1900) 65 N.J.L. 363.

**19. Claims not to be invalidated for informality.**—(1) A substantial compliance with sections 17 and 18 of this Act shall only be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites of the said sections unless in the opinion of the court, judge or officer who has power to try an action under this Act, the owner, contractor, sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section contained shall be construed as dispensing with registration of the lien required by this Act. 59 V. c. 35, s. 18.

(a) “*A substantial compliance.*”—This is a salutary provision. The parties to be affected by a claim are entitled to such information as it is essential for them to know in order to protect them against imposition and to safeguard their rights, but it is intended by the legislature that the terms of sections 17 and 18 should be followed merely in substance, so that on the one hand valid claims would not be lost on mere technicalities by applying a rigid literality to the terms of these sections, and on the other hand the obvious purpose of the sections would be secured by such compliance with their provisions as would by affording sufficient data ensure protection to owners, contractors, sub-contractors, mortgagees or other interested persons.

The courts will doubtless be indulgent in respect to omissions and defects which do not affect the substance of the notice and are not necessary as safeguards against imposition. In *Crerar*



v. *C. P. R. Co.*, (1903) 5 O.L.R. 383; 2 C.L.R. 107, *Boyd, C.*, said: "But these forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been 'substantial compliance,' to use the phrase found in section 19 (1), with the scheme of the Act. . . . It is not desirable, nor is it needful, that all the niceties of practice in due sequence should attach to the summary procedure provided for the realization of workmen's liens." See also observations of Killam, C.J., in *Robock v. Peters*, (1900) 13 Man., 139, cited, *ante*, p. 168. Defective descriptions of the land to be charged are immaterial if the description is sufficient to prevent anyone from being misled. On the other hand a total non-compliance with such conditions cannot be waived even by the owner, at least so far as third persons are concerned. *Boisot*, S. 5; *White v. School District*, 42 Conn. 541; *Burnside v. O'Hara*, 35 Ill. App. 150. In a recent New York Case (*Mahley v. German Bank*, (1903) 174 N.Y. App. 499) it was held that a notice of lien which failed to state when the first item of work was done or anything from which that time might be inferred, as required by sub-division 6 of section 9 of the N. Y. Lien Law (see Appendix A), was insufficient, notwithstanding that the notice substantially complied with the other provisions of the statute; since the provision thereof that the law shall be construed liberally does not authorize the court to dispense with what the statute says the notice shall contain.

Where a lien was filed against the owner of a property on which a building had been erected by the lessee, the failure to state the correct name of the person for whom the materials had been furnished and the labor performed would not invalidate the lien. *Steeves v. Sinclair*, (1902) 171 N.Y. 676. As to sufficiency of statement of labor performed, see *Clarke v. Heylman*, 80 N.Y. S. 794. A recent case in Massachusetts, *Angier v. Bay State*, (1901) 178 Mass. 163, illustrates the nature of the errors which may defeat a claim.

(b) "*Dispensing with registration.*"—If the provisions of section 23 are complied with, no other registration of the lien is necessary, except where the lien is claimed against the owner of the fee, under section 7 (3). See notes at p. 94.

**20. Lien to be registered an encumbrance.**—(1) The registrar upon payment of his fee, shall register the claim, so that the

same may appear as an encumbrance against the land therein described.

(2) **Fee for registration.**—The fee for registration shall be twenty-five cents. If several persons join in one claim, the registrar shall be entitled to a further fee of ten cents for every person after the first.

(3) **Manner of registration.**—The registrar shall not be bound to copy in any registry book any claim or affidavit, but he shall number each claim, and shall insert in the alphabetical and abstract indexes the like particulars as in other cases; he may describe the nature of the instrument as "Mechanics' Lien." 59 V. c. 35, s. 19.

(a) "*Shall insert in the alphabetical and abstract indexes.*"—As to the registrar omitting or delaying to register the claim, see *Lawrie v. Rathbun*, (1876) 38 U.C.Q.B. 255; *Getchell v. Moran*, (1878) 124 Mass. 404, 408; *Orne v. Barstow*, (1900) 175 Mass. 193.

**21. Lien-holder to be deemed a purchaser. Rev. Stat. c. 136.**—Where a claim is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act, but except as herein otherwise provided, the Registry Act shall not apply to any lien arising under this Act. 59 V. c. 35, s. 20.

(a) "*Shall be deemed a purchaser pro tanto.*"—Mortgagees under registered mortgage had advanced money to pay off prior mortgage and for improvements, when lien filed and action begun. Mortgagees were not parties. Mortgagees notified lien-holders and sold under mortgage and applied for order vacating registry of liens and *lis pendens*. Order granted mortgagees to pay surplus proceeds into court where they would be available for lien-holders. *Finn v. Miller*, (1889) 10 C.L.T. 23; 26 C.L.J. 55. See *Russell v. Russell*, (1881) 28 Gr. 419; *McCormick v. Bulivant*, (1878) 14 C.L.J. 85. See also *Hynes v. Smith*, 8 P.R. 73; 27 Gr. 150. In that case, however, the effect of sections 7 and 2,

sub-section 3, does not appear to have been considered except in the dissenting judgment of Proudfoot, J. See also Chapter II., *ante*.

(b) "*Except as herein otherwise provided.*"—Sections 22, 23 and 24 contain the exceptions. See *McVean v. Tiffin*, (1885) 13 A.R. 1; *Wanty v. Robins*, (1888) 15 O.R. 474.

(c) "*The Registry Act shall not apply.*"—See *Latch v. Bright*, (1869) 16 Gr. 653, and notes under sections 2 and 7. See the Ontario Registry Act, sub-sections 87, 97, and *Rose v. Peterkin*, (1885) 13 S.C.R. 677, which decided that although section 81, R.S.O. ch. 111, declared that "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this province after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns," that section did not apply to a case in which the party registering such instrument had actual notice of the equitable lien, charge or interest, even though the same had been created by parol.

See also *Miller v. Duggan*, (1890) 23 N.S.R. 120; (1892) 21 S.C.R. 33.

**22. Claims for liens when to be registered.**—(1) A claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or within thirty days after the completion thereof.

(2) A claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed.

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work for which the lien is claimed. 59 V. c. 35, s. 21; 60 V. c. 24, s. 5.

## AMENDMENT OF 1902.

The above section was amended by Chapter 21 of the Statutes of 1902, by adding the following sub-section :

(5) **Registration of contractor's lien after last certificate.**—In the case of a contract which is under the supervision of an architect, engineer or other person, upon whose certificate payments are to be made, the claim for a lien by a contractor may be registered within the time mentioned in sub-section 1 hereof, or within seven days after the said architect, engineer or other person has given his final certificate or has upon application to him by the contractor refused to give a final certificate.

(a) "*In cases not otherwise provided for.*"—i.e., such cases as are not provided for in sub-sections (3) and (4).

(b) "*Within thirty days.*"—Where there is a prior arrangement, although not binding, between a contractor and a supplier of building materials, whereby the former undertakes to procure from the latter all the material required for a particular building contract, so that, although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides, a lien for all materials so supplied is in time if registered within thirty days of the furnishing of the last item. *Morris v. Tharle*, (1893) 24 O.R. 159; *Robock v. Peters*, (1900) 13 Man. 124.

The thirty days within which the registration is to be effected should be computed not from the time certain trifling alterations were made in the machinery as supplied, but from the time the machinery was supplied and placed. *Neill v. Carroll*, (1880) 28 Gr. 30.

It cannot be said as a matter of law that work done by a mechanic under a contract substantially performed at an earlier date is only colorable because it is trifling in amount and done with the ulterior purpose of saving the lien. *Miller v. Wilkin-son*, (1896) 167 Mass. 136.

A lien was claimed for certain steel work done on a building which had been completed by the 30th September, 1893, with the exception of the cutting down of certain bolts which it was after-



wards found projected out of the walls too far, which was done between the 19th and 25th October, 1893. The lien was registered on the 17th November, 1903. Held, upon the authority of *Neill v. Carroll, supra*, which is incorrectly reported on appeal in 28 Gr. 339, that the lien was registered too late, since the time should have been computed from 30th September, and was not extended by the alterations of the bolts. *Summers v. Beard*, (1894) 24 O.R. 641.

Under the provisions of the Act of 1874, it was held that a contractor, though entitled to a lien upon property for the construction of which he had furnished material to an original contractor or another sub-contractor, must in order to enforce such lien institute proceedings for that purpose within thirty days after the material furnished; the lien in such case arising from the furnishing of the material or the doing of the work, not from registration as under the Act of 1873. *McCormick v. Bullivant*, (1877) 25 Gr. 273.

See *Lindop v. Martin*, (1883) 3 C.L.T. 312, cited under "materials," at p. 77.

Merchants supplied materials to the contractor for certain buildings and claimed a lien in respect thereof. There was no contract for the placing of these materials upon the property; the last of them were bought by the contractor from the merchants on the 22nd November and were by him placed in the building on the 23rd November. Held, that the time for registering the claim of lien under section 21, R.S.O. 1877, ch. 126, began to run from the 22nd November. *Hall v. Hogg*, (1890) 20 O.R. 13.

See *Dempster v. Wright*, (1900) 21 C.L.T. 88, referred to under section 20 of the Nova Scotia Mechanics' Lien Act.

In a number of Massachusetts cases it has been held that the filing must be within thirty days after the last of the items for which a lien is given was performed or furnished, although other items for which there is no lien were performed or furnished later. *Gale v. Blaikie*, (1880) 129 Mass. 206; *Kennebec Co. v. Pickering*, (1886) 142 Mass. 80; *Worthen v. Cleveland*, (1880) 129 Mass. 570; *O'Driscoll v. Bradford*, (1898) 171 Mass. 231.

If a sworn statement of a mechanics' lien is filed within thirty days after the claimant had ceased to labor and if the last items of labor were performed in good faith under the contract, the lien is none the less valid because before the work named in the last items was done no work had been done for about 34 days,

and before the last work was done the houses on which the lien was claimed appeared to be completed and were purchased by their present owner without knowledge of any lien. *D. L. Billings Co. v. Brand*, (1905) 187 Mass. 417. See also *Cole v. Uhl*, 46 Conn. 296, and *Nichols v. Culver*, 51 Conn. 177.

Sundays are included in the thirty days and if the last day falls on Sunday, the registration must take place the day before. See *Haley v. Young*, (1883) 134 Mass. 364; *Oakland Manufacturing Co. v. Lemieux*, 98 Me. 488. See also *Bowes v. N. Y. Christian Home*, 54 How. Pr. 509, as to rule about computation of time.

But in Ontario the Interpretation Act, R.S.O. 1897, ch. 1, sub-secs. 16 and 17, provides that if the time limited for the doing of anything expires upon a Sunday, such thing may be done on the day next following which is not a holiday.

Under the Massachusetts Act, a person who furnishes lumber at a certain price per thousand feet at different times under an entire contract in the erection of a building, loses his lien if he neglects to file his statement of the amount due him within thirty days after the last item is furnished which is actually used in the erection of the building. In this case the last lot of lumber sent was piled up in the building and not used. *Kennebec Framing Co. v. Pickering*, (1886) 142 Mass. 80. But this decision would not be followed in Canada, as none of the Provincial Acts make the incorporation of the materials in the building essential to the establishment of a lien. In an Ontario case the facts were that materials were placed on the land by the owner thereof and paid for by the mortgagee to be used in the construction of buildings being erected thereon, but were not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and, having been left there for some time, and storage charges incurred, the mortgagee sold them to the mill owner. Held, that a lien attached on such materials, notwithstanding the absence of incorporation in the building, but, there having been a conversion, no relief could be granted, for there is nothing in the Act enabling the court to assess damages, which could be made applicable to lien-holders. *Larkin v. Larkin*, (1900) 32 O.R. 80. See also notes under "b" of this section.

Whether the last work done by a mechanic was part and parcel of the original job or not depends upon evidence and upon

the finding of that fact the lien depends. *Holden v. Winslow*, 18 Penn. 160; *Bartlett v. Kingan*, 19 Penn. 341.

Lien creditors are concluded as to the sufficiency of the completion of the building, in the absence of fraud or mistake, by its acceptance by the architect and the owner. *Oriental Hotel Co. v. Griffiths*, (1895) 30 L.R.A. 765.

(c) "*May be registered.*"—A mistake of the registrar is connection with the registration cannot prejudice the claimant. *Getchell v. Moran*, (1878) 124 Mass. 404, 408; *Lawrie v. Rathbun*, (1876) 38 U.C.Q.B. 255, and *Orne v. Barstow*, (1900) 175 Mass. 193.

Under a former Act, it was held that a lien might be registered after dishonor of promissory note taken for the amount of the lien if registered within the statutory time. *Lindop v. Martin*, 3 C.L.T. 212. Section 28 expressly declares that certain conduct shall not prejudice the right to enforce the lien, except under special conditions. A lien lost, however, by taking a promissory note is not revived upon dishonor thereof. *Edmonds v. Tiernan*, (1891) 2 B.C.R. 82; 21 S.C.R. 406. See, however, notes to section 28 (a).

Materials were placed on the land by the owner thereof, and paid for by the mortgagee, to be used in the construction of buildings being erected thereon, but were not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and, having been left there for some time and storage charges incurred, the mortgagee sold them to the mill owner. Held, that a lien attached on such materials, notwithstanding the absence of incorporation in the buildings, but there having been a conversion no relief could be granted. *Larkin v. Larkin*, (1900) 32 O. R. 80.

(d) "*Materials.*"—Materials were supplied from day to day, nothing being said as to the particular building and there being no express contract. Held, that the lien might be registered at any time within thirty days from the last item. In the absence of appropriation payment on running account to be credited on the first items and lien might be claimed for balance. *Lindop v. Martin*, (1883) 3 C.L.T. 312. See *British Columbia Timber Co. v. Leberry*, (1902) 22 C.L.T. 273. See also *Robock v. Peters*, (1900) 13 Man. 124, the facts in which are stated under section 20 of the Manitoba Lien Act, at p. 199, *post*, in which case *Chad-*

*wick v. Hunter*, 1 Man. 39, is distinguished, and *Morris v. Tharle*, 24 O.R. 159, followed. *Summers v. Beard*, (1894) 24 O.R. 641, and *Kelly v. McKenzie*, (1884) 1 Man. 169, not applicable.

Where a material-man contracts to deliver material in a manufactured form, the contract is for materials only and a lien cannot be had for labor performed in manufacturing the materials as a claim for labor. *Tracey v. Wetherell*, (1896) 165 Mass. 113; *Donaher v. Boston*, (1879) 126 Mass. 309.

An existing building which is sold for the purpose of constituting part of a larger building to be erected may be considered materials furnished within the statute. *Selden v. Melks*, 17 Cal. 128.

Where materials were supplied from time to time as required, not under any contract, it was held that the furnishing of each lot of goods was a separate transaction. *Chadwick v. Hunter*, (1884) 1 Man. 39. See this case distinguished in *Robock v. Peters*, (1900) 13 Man. 124, and *Morris v. Tharle*, (1893) 24 O.R. 159, followed. See note to this latter case at p. 136.

When a contractor working for several owners has but a single contract for the supply of materials with the material men, the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the material man and the contractor, but by the completion of the work by the contractor for the several owners. *Re Moorehouse v. Leake*, (1886) 13 O.R. 290. As to the time within which a sub-contractor for materials must register, see *Hall v. Hogg*, (1890) 20 O.R. 13.

Where the work has been done and accepted by the "owner" the existence of trifling defects subsequently rectified by the contractor will not extend the time until thirty days from the date when the defects were rectified, even though the work was accepted on the understanding that the defects were to be remedied. *Makins v. Robinson*, (1884) 6 O.R. 1; *Kelly v. McKenzie*, (1884) 1 Man. 169. See also *Neill v. Carroll*, 28 Gr. 30, affirmed 28 Gr. 339. See report as to this case in *Summers v. Beard*, (1894) 24 O.R. 641.

But in a number of recent Massachusetts cases it has been held that where the last work, although trifling in amount and done with the ulterior purpose of saving the lien, was nevertheless called for by the contract which had been treated as fully completed at an earlier date, the thirty days are to be reckoned



from such last work. *Morse, Williams Co. v. Ellis*, (1899) 172 Mass. 378; *Sprague v. McDougall*, (1899) 172 Mass. 553; *Mona-ghan v. Goddard*, (1899) 173 Mass. 468; *Burrell v. Way*, (1900) 176 Mass. 164; *McLean v. Wiley*, (1900) 176 Mass. 233. See also *D. L. Billings Co. v. Brand*, (1905) 187 Mass. 417, cited, *post*, at p. 137.

In a Manitoba case the facts were that the work was completed on the 18th August with the exception of putting up an iron cresting which by the contract was to be placed on the verandah. The cresting was put on the top of the house on the 29th October, the plaintiff asserting as a reason for the delay that he had no money to pay for the cresting, the defendant having refused to pay him. The statement of claim was not filed within thirty days from the 18th August, but was within thirty days from the 29th October. There was no evidence of any variation of the contract as to the place where the cresting was to be placed nor of its acceptance by any act of the defendant. Held (Kilham, J., dissenting), that the statement was filed within thirty days from the completion of the work. *Irwin v. Beynon*, (1886) 4 Man. 10. See also cases cited under section 4, note (d) and section 16, note (c).

(e) "*Services.*"—This word used here and in section 4 is broad enough to include the professional work of an architect in drawing plans and specifications, or the work of an engineer in furnishing expert calculations in respect to the building subsequently erected. See reference under section 4, p. 70.

(f) "*Wages.*"—See section 2 (6), *ante*, p. 53.

(g) "*Upon whose certificate.*"—The certificate of an architect in a dispute between the building owner and the builder is no estoppel in an action by the building owner against the architect for negligence. *Badgley v. Dickson*, (1886) 13 A.R. 494; *Rogers v. James*, (1891) 8 Times L.R. 67.

**23. Liens to cease if proceedings not had within time fixed by Act—Rev. Stat. c. 138.**—Every lien which is not duly registered under the provisions of this Act shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof unless in the meantime an action is commenced to realize the claim, or in which the claim may be realized under the

provisions of this Act, and a certificate thereof according to Form 6 in the schedule hereto, signed by the proper officer of the court, is duly registered in the registry office of the registry division, or where the land is registered under the Land Titles Act, in the land titles office of the locality, wherein the lands in respect of which the lien is claimed are situate. 59 V. c. 35, s. 22; 60 V. c. 3, s. 3; c. 15, Sched. A. (76).

(a) "*Which is not duly registered.*"—Under the present Act the cases of *Burritt v. Renihan*, (1877) 25 Gr. 183, and *Neill v. Carroll*, (1880) 28 Gr. 30; 339, and see *Ritchie v. Grundy*, (1891) 7 Man. 532, are no longer applicable in this connection, as an action can now be commenced and a *lis pendens* registered before the period of credit has expired. See section 28. See *Robock v. Peters*, (1900) 13 Man. 124.

(b) "*An action is commenced.*"—i.e., by any lien-holder. See section 32; *Bunting v. Bell*, (1876) 23 Gr. 584; *Hovenden v. Ellison*, (1877) 24 Gr. 448; *McPherson v. Gedge*, (1883) 4 O.R. 246.

In an action brought against the builder and owner the plaintiff must show that his right of action was complete at the time the action was commenced. *Titus v. Gunn*, (1903) 69 N.J.L. 410.

The period of ninety days, limited by section 21 of the Mechanics' Lien Act (1887) for the commencement of proceedings to enforce the lien applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that whether proceedings have or have not been taken against the owner within the ninety days. The plaintiffs, assignees of a mechanics' lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien as against the owner, they brought this action after the lapse of more than ninety days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land. Held, reversing the judgment in 3 O.R. 183, that the lien had ceased to exist as against the mortgagee. *Bank of Montreal v. Haffner*, (1884) 10 A.R. 592; s.c., 29 Gr. 319. But see *Cole v. Hall*, (1888) 12 P.R. 584; 13 P.R. 100, in which the facts were as follows: The appellant's execution against lands was

placed in the sheriff's hands shortly after the registration of a mechanics' lien by the plaintiff, who began his action to enforce such lien and registered his *lis pendens* within the ninety days prescribed by section 23 of the Act (R.S.O. 1887, c. 126), but did not cause the appellant to be added as a party till the cause had been brought into the Master's office, which was after the expiry of the ninety days. The appellant contended that as against him, proceedings to realize the plaintiff's claim had not been instituted within the proper time, and therefore his execution had gained priority over the lien, and he was improperly added as a subsequent incumbrancer in the Master's office. Section 29 of the Act provides that the lien may be realized in the High Court, according to the ordinary procedure of that court. Held, that the effect of sections 23 and 29 is that the lien shall cease after ninety days, unless in the meantime proceedings are instituted in the High Court according to its ordinary procedure to realize the claim; the practice or procedure of the court is as much the law of the land as any other part of the law; and the making the appellant a party to the proceedings in the Master's office was a regular step in the action, authorized and prescribed by the practice and procedure of the court for nearly thirty years, of which the appellant could not complain, the action having been regularly commenced within the ninety days. See *Keffer v. Miller*, (1890) 10 C.L.T.

In an action under a former Act by lien-holders to enforce their lien it was held that it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lien-holders; but this can be done when they are added as defendants in the Master's office. *Hall v. Hogg*, (1890) 14 P.R. 45.

(c) "*An action is commenced to realize the claim.*"—In *Davidson v. Campbell*, (1888) 5 Man. 250, the bill alleged a contract with defendant, C., for the performance of certain work in the erection of a building upon land of C. By amendment made after the time for filing the bill had lapsed, the plaintiffs alleged that their contract was with the defendants K. and McD., who had contracted with C. for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new certificate of *lis pendens* was filed. Held, that the plaintiff could not rely upon the original bill and certificate of *lis*

*pendens*. The case might be different if formal amendments were made, but the course taken in the present proceedings, if sanctioned, would be introducing by amendment an entirely new cause of action after the expiration of the period for commencing their suit. "If the lien ceased to exist in consequence of the plaintiffs not filing a bill upon their real contract, it could not be revived by a failure to plead properly, and the plaintiffs ought not thereby to acquire rights which they had not when the bill was amended," *per* Killam, J. See *Cole v. Hall*, cited *supra*.

The "owner," and also the person liable on the contract under which the plaintiff claims, should both be made defendants (See *Wood v. Stringer*, 20 O.R. 148), and also a prior mortgagee where relief is sought against him under section 7, sub-section 3. *Bank of Montreal v. Haffner*, 29 Gr. 319; (1884) 10 A.R. 592. See also notes under section 31, "Parties," p. 152.

(d) "*A certificate thereof.*"—For form of certificate for Registration see Appendix.

(e) "*Duly registered.*"—For cases in relation to errors of registrar in indexing or omitting to index instruments, see section 22 at p. 139.

As to what constitutes sufficient registration of *lis pendens* see *Bunting v. Bell*, (1876) 23 Gr. 584; *McPherson v. Gedge*, (1883) 4 O.R. 246. See also section 32.

#### **24. When lien to cease if registered and not proceeded upon.—**

(1) Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime an action is commenced to realize the claim under the provisions of this Act, or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate registered as required by the next preceding section. 59 V. c. 35, s. 23 (1); 60 V. c. 15, Sched. A (76).

(2) **Lien to expire at end of six months unless renewed.**—The registration of a lien shall cease to have any effect at the expira-



tion of six months from the registration thereof, unless the lien shall be again registered within the said period, except, in the meantime, proceedings have been instituted to realize the claim and a certificate thereof has been duly registered in the proper registry or land titles office. 59 V. c. 35, s. 23 (2).

(a) "*Duly registered.*"—When a contractor working for several owners has but a single contract for the supply of materials with the material men the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the materialman and the contractor, but by the completion of the work by the contractor for the several owners. *Re Moorehouse v. Leake*, (1886) 13 O.R. 290; but the time for registration of a sub-contractor's lien or the bringing of an action to enforce it is not extended by any delay on the part of the contractor or sub-contractor to whom the materials are supplied in actually placing them on the premises. Thus where merchants supplied materials to the contractor for certain buildings and it appeared that there was no contract for the placing of these materials upon the property, the last of them being bought by the contractor from the merchants on 22nd November and by him placed in the building on the 23rd November, it was held that the time for registering the claim of lien under sec. 21 of the Statute of 1877 began to run from the 22nd of November. *Hall v. Hogg*, (1890) 20 O.R. 13.

(b) "*Shall absolutely cease to exist.*"—An action was begun to enforce a lien against M., the person for whom the work was done, and at that time the owner. The action was begun within the ninety days, but after advances by M. to C., plaintiff obtained *ex parte* order adding C. after expiry of the ninety days. Order set aside as no right of action against C. after expiry of ninety days, and action dismissed against C. and *lis pendens* against him vacated. *Bank of Montreal v. Haffner*, 10 A.R. 593 followed. *Keffer v. Miller*, (1890) 10 C.L.T. 90.

(c) "*The expiry of the period of credit.*"—See *Burritt v. Renihan*, (1877) 25 Gr. 183; *Haggerty v. Grant*, (1892) 2 B.C.R. 173, and secs. 25 and 28.

(d) "*An action is commenced in which the claim may be realized.*"—Persons who have registered liens but have taken no proceedings to realize them cannot have the benefit of proceedings taken by other persons to enforce liens against the same land where the liens of such other persons are not enforceable. *Re Sear v. Woods*, (1892) 23 O.R. 474. A defence filed by a lienholder within the period mentioned in the Act, in an action by the owner of the property to set aside a lien is not a proceeding "to realize the claim" within the meaning of sec. 23 of the Act, though a counter-claim if properly framed and a certificate thereof duly registered might be. *McNamara v. Kirkland*, (1891) 18 A.R. 271.

(e) "*Unless the lien shall be again registered.*"—Re-registration in unnecessary if proceedings are taken under sec. 28.

**25. When lien to cease if there is no period of credit.**—If there is no period of credit, or if the date of the expiry of the period of credit is not stated in the claim so registered, the lien shall cease to exist upon the expiration of ninety days after the work or service has been completed or materials furnished or placed unless in the meantime an action shall have been commenced and a certificate registered as required by section 23 of this Act. 59 V. c. 35, s. 24.

(a) "*Period of credit.*"—See note under sec. 28 (a) and cases cited thereunder.

(b) "*Work or service has been completed or materials furnished.*"—Where the work has been done and accepted by the "owner" the existence of trifling defects subsequently rectified by the contractor will not extend the time until thirty days from the date when the defect was rectified, even though the work was accepted on the understanding that the defect was to be remedied. *Makins v. Robinson*, (1884) 6 O.R. 1; *Kelly v. McKenzie*, (1884) 1 Man. 169. See reference to *Neill v. Carroll*, *ante*, p. 6, which case is inaccurately reported in 28 Gr. 339. See note summarizing *Irwin v. Beynon*, (1886) 4 Man. 10, *ante*, p. 141.

**26. Death of lien-holder.**—In the event of the death of a lienholder his right of lien shall pass to his personal representatives:

and the right of a lien-holder may be assigned by any instrument in writing. 59 V. c. 35, s. 25.

(a) "*The right of a lien-holder may be assigned.*"—A counter-claim or set-off is available against the assignee. *Lawrence v. Congregational Church*, (1900) 164 N.Y. App. 115. A defect of parties to an action by an assignee, arising from the failure to join a prior assignee, to whose assignment plaintiff's assignment was expressly subject, is waived where the attention of the trial court is not directed to the point at the trial. *Ib.* See this case also as to effect of an order substituting assignee as plaintiff, as an adjudication of the right to prosecute the action. See also *Moore v. Dugan*, (1901) 179 Mass. 153, and *Hawkins v. Mapes-Reeves Co.*, (1904) 178 N.Y. App. 236. Under a general assignment for the benefit of creditors made by a general contractor who has furnished and provided materials for and towards the erection of a building for which moneys are due or to become due to him, the assignee takes such moneys, subject to liens filed by laborers, mechanics, material-men or sub-contractors, subject to the assignment and within the ninety days prescribed by the statute. *Kane Co. v. Kinney*, (1903) 174 N.Y. App. 69. As to effect of assignment of claim before filing lien, see *Williams v. Weinbaum*, (1901) 178 Mass. 239. See also *Wiley v. Connelly*, (1901) 179 Mass. 360.

A mechanic having a claim for the erection of buildings under a contract assigned his claim to the plaintiff to secure money due to the plaintiff, and the plaintiff for the purpose of enabling the mechanic to register under the Act re-assigned to him. Held, that such re-assignment enabled the mechanic to make the claim for registry notwithstanding the equitable right of plaintiff. *Currier v. Frederick*, (1875) 22 Gr. 243.

**27. Discharge of lien.**—(1) A lien may be discharged by a receipt signed by the claimant, or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and registered; such receipt shall be numbered and entered by the registrar like other instruments, but need not be copied in any book, but the registrar shall enter against the entry of the lien to which the discharge relates the word "discharged," and state

the registration number of such discharge; the fees shall be the same as for registering a claim of lien.

(2) **Security or payment into court and vacating lien thereon.**—Upon application the court or judge or other officer having power to try an action to realize a lien, may receive security or payment into court in lieu of the amount of the claim and may thereupon vacate the registration of the lien.

(3) **Vacating registration on other grounds.**—The court or such judge or other officer may vacate the said registration upon any other ground.

(4) **When notice of application to vacate not requisite.**—Where the certificate required by section 23 or section 24 of this Act has not been registered within the time limited, and an application is made to vacate the registration of a lien after the time for registration of the certificate required by sections 23, 24 and 25 of this Act, the applicant shall not be required to give notice of the application to the person claiming the lien, and the order vacating the lien may be made *ex parte* upon production of the certificate of the proper registrar certifying the facts entitling the applicant to such order. 59 V. c. 35, s. 26 (1-4).

(a) *“A receipt.”*—Any form of receipt which acknowledges payment of a specified claim and is verified by affidavit sworn before a commissioner is sufficient, if registered.

(b) *“Or his agent duly authorized in writing.”*—It is desirable to register also the written authority of the agent.

(c) *“Court or judge or other officer.”*—These tribunals are designated in sec. 34. See as to awarding costs, sec. 44.

(d) *“Payment into court.”*—The mode of payment is prescribed by the *Con. Rules*, 405, 410.

(e) *“Upon any other ground.”*—Mortgagees under registered mortgage had advanced money to pay off prior mortgage and for improvement when lien filed and action begun. Mortgagees were not made parties. Mortgagees notified lien-holders and sold under mortgage and applied for order vacating registry of liens and *lis pendens*. Order granted mortgagees to pay the



surplus proceeds into court where it could be applied for by lien-holders. *Finn v. Miller*, (1889) 10 C.L.T. 23; 26 C.L.J. 55.

**28. Certain acts not to prejudice right to enforce lien.**—The taking of any security for, or the acceptance of any promissory note for, or the taking of any other acknowledgment of the claim, or the giving of time for the payment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by this Act, unless the lien-holder agrees in writing that it shall have that effect; provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit of this sub-section shall commence an action to enforce such lien within the time limited by this Act, and register a certificate as required by sections 23, 24 and 25 of this Act, but no further proceeding shall be taken in the action until the expiration of such extension of time; provided further, that notwithstanding such extension of time, such person may, where an action is commenced by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such action, as if no such extension had been given. 59 V. c. 35, s. 26 (5).

(a) “*The taking of any security.*”—The taking of security, note or acknowledgment or the giving of time, destroys the lien if the lien-holder neglects to proceed to enforce his lien within the time limited by secs. 23, 24 and 25.

A lien lost by taking a promissory note is not revived upon dishonor thereof. *Edmonds v. Tiernan*, (1891) 2 B.C.R. 82; 21 S.C.R. 406.

Without this section it would be a question of fact in every case whether the note was taken in payment of the account. *Casey v. Weaver*, (1886) 141 Mass. 280; *Jones v. Shawhan*, 4 Watts & Serg. (Pa.) 257. If the note was taken in payment the lien was gone. If the note was not taken in payment it amounts to no waiver of the lien. *Edwards v. Derrickson*, (1859) 28

N.J.L. 39; *Jones v. Moores*, (1893) 74 N.Y. 109, 22 N.Y. Supp. 53; *Linneman v. Bieber*, (1895) 92 N.Y. 477, 33 N.Y. Supp. 129. The other provisions of the Act must be complied with even if it involves taking proceedings to enforce the lien before the maturity of the note, in which case it seems that proceedings may be taken within the time, subject, possibly, to being stayed until after the maturity of the note.

After the note has been negotiated the debt then becomes due to a third party and the original creditor becomes a guarantor of payment of the debt. While the note is in the hands of a third party no proceedings can be taken to enforce the lien. If the lien claimant pays the note and is the holder of the note at the time he begins proceedings the fact of his having negotiated the note will not take away his lien. See also *McLean v. Wiley*, (1900) 176 Mass. 233; *Brewer Co. v. B. & A. R. R. Co.*, (1901) 179 Mass. 228.

**29. Lien-holders to be entitled to information from owner as to terms of contract.**—Any lien-holder may at any time demand of the owner or his agent, the terms of the contract or agreement with the contractor for and in respect of which the work, service or materials is or are performed or furnished or placed, and if such owner or his said agent shall not, at the time of such demand or within a reasonable time thereafter, inform the person making such demand, of the terms of such contract or agreement, and the amount due and unpaid upon such contract or agreement, or shall intentionally or knowingly falsely state the terms of said contract or agreement, or the amount due or unpaid thereon, and if the person claiming the lien shall sustain loss by reason of such refusal or neglect or false statement, the said owner shall be liable to him in an action therefor to the amount of such loss. 59 V. c. 35, s. 27; 60 V. c. 24, s. 6.

(a) "*Any lien-holder may at any time demand.*"—A form of demand is not given in the Act and a written demand is really unnecessary. This section is for the protection of sub-contractors, laborers and material men. See *Lumbard v. Syracuse*, (1874) 55 N.Y. 494.

(b) "*An action therefor,*" i.e., an ordinary action.

**30. Order for inspection of contract by lien-holder.**—The Court or judge, or other officer having power to try an action to realize a lien, may on a summary application at any time before or after any action is commenced for the enforcement of such lien, make an order for the owner or his agent to produce and allow any lien-holder to inspect any such contract, and may make such an order as to the costs of such application and order as may be just. 59 V. c. 35, s. 38.

(a) "*The court or judge or other officer.*"—See secs. 31 and 34 as to these tribunals.

Under a former Act (R.S.O. 1887, ch. 126, sec. 23), which allowed proceedings to recover the amount of a mechanics' lien to be taken under certain circumstances in County Courts and Division Courts, it was held that this provision applied only to actions in which the party seeking to enforce his lien was suing in the ordinary way to obtain judgment and execution. These courts cannot entertain an *action* in the nature of an action of account by a lien-holder against a mortgagee who has sold the land in question under mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson v. Valliers*, (1892) 19 A.R. 154.

**31. Mode of realizing liens.**—(1) The liens created by this Act may be realized by actions in the High Court according to the ordinary procedure of that court, excepting where the same is varied by this Act.

(2) Without issuing a writ of summons, an action under this Act shall be commenced by filing in the proper office a statement of claim, verified by affidavit (Form 5).

(3) The statement of claim shall be served within one month after it is filed, but a judge or other officer having power to try the action may extend the time for service thereof, and the time for delivering a statement of defence (Forms 7 and 8) shall

be the same as for entering an appearance in an action in the High Court.

(4) It shall not be necessary to make any lien-holders parties defendant to the action, but all lien-holders served with the notice of trial shall for all purposes be treated as if they were parties to the action. 59 V. c. 35, s. 29.

(a) "*Excepting where the same is varied.*"—Sub-sections 2, 3 and 4 and sec. 33 state the variations from ordinary procedure.

(b) "*A statement of claim.*"—Where there was no averment in statement of claim that anything was due by the owner, held, on demurrer, that the statement of claim was bad. *Townsend v. Baldwin*, (1889) 10 C.L.T. 13. A statement of claim did not disclose the kind of materials, etc. Held, bad, but as lien is operative when registered and action brought and certificate of *lis pendens* registered, plaintiff's lien was not prejudiced. *Johnson v. Braden*, (1887) 1 B.C.R. Pt. 2, p. 265.

All actions and proceedings to enforce mechanics' liens must be brought and taken in the High Court of Justice under the procedure enacted by 59 Vict. ch. 35, as amended by 60 Vict. ch. 24. Although by secs. 31 and 32 of the former Act, a County Court Judge has complete jurisdiction in such an action or proceeding if in the High Court, yet, if the proceedings are instituted in a County Court he has no jurisdiction. In *Re Ribble v. Aldwell*, (1898) 18 C.L.T. 59. Under 53 Vict. ch. 37, it is competent to join liens so as to give jurisdiction to the High Court though each apart may be within the competence of an inferior court. The plaintiffs in proceeding under that Act to enforce their lien filed with a Master as the "statement of claim" a copy of the claim of lien and affidavit registered, verified by an affidavit, and the Master thereupon issued his certificate. Held, that if the "statement of claim" filed was not in proper form, yet as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* should be allowed. *Bickerton v. Dakin*, (1890) 20 O.R. 192, 695. See *Beveredge v. Hawes*, (1903) 2 O.W.R. 619.

*Parties; Plaintiffs.*—A plaintiff need not name any other lien-holders as co-plaintiffs.

*Defendants.*—The "owner," and any subsequent transferees should be made parties. Any prior mortgagee against whom the plaintiffs claims relief under sec. 7 (3) should also be made a



defendant. A decree enforcing a mechanics' lien is a conclusive determination of the rights of the parties, but it does not conclude persons who are neither parties nor privies. *Bank of Montreal v. Haffner*, (1884) 29 Gr. 319, 10 A.R. 592, S.C. *sub nom. Bank of Montreal v. Worswick*, Cass. Dig. 289. In *Fraser v. Griffiths*, (1902) 1 O.W.R. 141, where plaintiff had no notice of contract under which defendant Ray claimed title and her conveyance was registered after registration of *lis pendens* in present action, held, that she need not have been joined as defendant as she took subject to the proceedings in the action.

A mortgagee filed a bill for sale, making certain lien-holders under the Act parties defendants therein, alleging that the work by virtue of which their liens arose, was commenced after the registration of his mortgage. Held, that the lien-holders should have been made parties in the Master's office; the costs of making them defendants by bill were disallowed, on revision of taxation. *Jackson v. Hammond*, (1879) 8 P.R. 157.

The grantees of the owner, although the transfers to them were fraudulent, are entitled to contest the validity of the lien. *Toop v. Smith*, (1905) 181 N.Y. 283.

Where a bill is filed by a sub-contractor against the owner of the property and a contractor with him to enforce a claim against such contractor; the owner of the property and all persons claiming to have liens are necessary parties in the Master's office, whose costs will be ordered to be paid out of the amount found due the contractor and the balance distributed ratably among the several lien-holders and a personal order made against the contractor for the deficiency, if any. A suit brought by a lien-holder operates for the benefit of all of the same class, so that a suit instituted by one within the thirty days mentioned in the Act, keeps alive all similar liens then existing. *Hovenden v. Ellison*, (1877) 24 Gr. 448. See *Finn v. Müller*, (1889) 10 C.L.T. 23, 26 C.L.J. 55, cited, *ante*, p. 148.

Plaintiff in action to enforce lien joined architect as defendant and claimed damages against him for fraudulently withholding certificate. Held, that he should be struck out as defendant and claim against him dismissed. Actions under the Mechanics' Lien Act have many incidents created by the Act which other actions do not have, but no power is given to join such a claim. The claim was good as against the owner, but as against the architect plaintiff must pursue his ordinary remedy.

*Bagshaw v. Johnson*, (1901) 3 O.L.R. 58. See also *Larkin v. Larkin*, (1900) 32 O.R. 80, cited, *ante*, p. 74.

(c) "*Shall be served within one month after it is filed.*"—An order allowing service of writ out of jurisdiction should also authorize service of statement of claim at the same time and fix a time for delivery of defence. If not, eight days must be allowed from time limited for appearance under Rule 246. Chapter 153, sec. 35 (1) requires appointment to be signed by judge, and sec. 36 requires eight clear days' notice of trial. *McIver v. Crown Point*, (1900) 19 P.R. 335.

The plaintiff registered a mechanics' lien against the defendant company, and subsequently filed his statement of claim. He obtained an order for the service of the statement of claim out of the jurisdiction, and service was effected in pursuance thereof. The defendant company applied to have the order and service thereunder set aside, on the ground that there was no statutory authority therefor. Section 28, sub-sec. 1, of the Mechanics' Lien Act, R.S.N.S. ch. 171, provides that "the liens created by this chapter may be enforced by actions to be brought and tried according to the ordinary procedure in the respective courts." Sub-section 2 of the same section provides that without issuing a writ of summons an action under this chapter shall be commenced by filing in the office of the prothonotary . . . "a statement of claim verified by affidavit." Sub-section 6 provides that "the statement of claim shall be served within one month after it is filed." Held, that the service was good by reason of sec. 288 of the Act, the ordinary procedure of the court with respect to the service of a writ having been followed in serving the statement of claim. Application dismissed with costs. *McDonald v. Consolidated G. M. Co.*, (1901) 21 C.L.T. 482.

But a more recent decision in Ontario is in conflict with this case. In the Ontario case it was decided that service of a statement of claim out of the jurisdiction as the initial step in the action is not allowed under the Judicature Rules, and the history of legislation as to service out of the jurisdiction in Ontario is given. See *In re Busfield, Whaley v. Busfield*, (1886) 32 Ch. D. 123. It is not a matter of practice, but of jurisdiction. The provisions in that behalf form a complete code on the subject and cannot be extended by analogy. *Pennington v. Morley*, (1902) 3 O.L.R. 514. This case, which was decided by Meredith, C.J., is more in accordance with the principles governing service out of the

jurisdiction than the case reported in 21 C.L.T. 482 and probably correctly states the law on the subject.

The month is a calendar month. See the Interpretation Acts (R.S.O. ch. 1, sec. 8, sub-sec. 15); R.S.N.S. ch. 1, sec. 22, sub-sec. 24; R.S.M. ch. 89, sec. 8 (q); R.S.B.C. ch. 1, sec. 10, sub-sec. 16; R.S.N.B. ch. 1, sec. 8, sub-sec. 27; R.O. Terr. ch. 1, sec. 8, sub-sec. 18.

Amendment of pleadings. See *Orr v. Davie*, 22 O.R. 430.

Where a single debt exists for work done or materials furnished in the erection of several buildings, the liens therefor are to be enforced by a single lien claim, and a single declaration, in which the debt is to be apportioned among the buildings and curtilages according to their respective liability. *Culver v. Lieberman*, (1903) 69 N.J.L. 341.

(d) "*As if they were parties*,"—See *Robock v. Peters*, (1900) 13 Man. 124, where parties were brought in by notice of trial.

**32. Lien-holders joining in action.**—Any number of lien-holders claiming liens on the same property, may join in an action, and any action brought by a lien-holder shall be taken to be brought on behalf of all other lien-holders on the property in question. 58 V. c. 35, s. 30.

(a) "*On behalf of all other lien-holders*,"—Plaintiffs were day-laborer who did work for defendants in Rainy River District and said that they resided in that district. Held, that the statutory act which gives vitality to a lien is its due registration, and this may be effected by affidavit of an agent or assignee. This section allows wage-earners to group themselves as litigants and as all are within the limits of the district and the address of the solicitor is given the action should not be stayed. *Crerar v. C.P.R.*, (1903) 5 O.L.R. 383.

See *Robock v. Peters*, (1900) 13 Man. 124.

(b) Under sec. 15 of a former Act (1877) it was held that suits brought by a lien-holder should be taken to be brought on behalf of all lien-holders of the same class, and in case of a plaintiff's death or his refusal or neglect to proceed, the suit may by leave of the court be prosecuted by any lien-holder of the same class. A number of unregistered lien-holders brought an action

under the Act to enforce their liens against one G., which proceeded to the close of the pleadings and was then dismissed with the plaintiff's assent. P., the assignee of a registered lien-holder, relying on the action, took no steps to enforce his lien or to register a certificate within the ninety days, under sec. 21. On being informed of the dismissal of the action he applied to be allowed to intervene as plaintiff and to prosecute the suit on his own behalf. Held, that the applicant should be allowed to intervene and prosecute the action, and that the applicant was of the same class as the plaintiffs, in that they all contracted with, or were employed by, G. Lien-holders "of the same class" are those who have contracted with the same person, whether their liens are registered or not. *McPherson v. Gedge*, (1883) 4 O.R. 246. A lien-holder thus intervening must indemnify the original plaintiff against all costs past and future (*Patterson v. Scott*, 4 Gr. 145) and if he carry on the action in the name of the original plaintiff, he must also give the defendant security for his costs. *McPherson v. Gedge*, *supra*. No such intervention can be beneficial unless the original plaintiff had a right of action. *Re Sear v. Woods*, (1892) 23 O.R. 474.

An action to enforce a lien was dismissed by consent when the trial came on. A lien-holder for wages applied for leave to proceed with the action, and it was ordered that the applicant be substituted on behalf of himself and all other lien-holders of the same class and that necessary amendments be made. R.S.O. ch. 126, sec. 30. *Richardson v. Mark*, (1891) 11 C.L.T. 283.

A class suit, after decree, cannot be dismissed, as the decree enures to the benefit of other creditors. Neither on the same principle can any order be made vacating the *lis pendens* to the prejudice of other creditors. The only proper order is that all proceedings in the suit on the part of the plaintiff be stayed, but without prejudice to the rights of other creditors (if any) to apply to prosecute the same. *Arnbery v. Thornton*, (1874) 6 P.R. 190.

Under a former Act, which enacted that a plaintiff represented "all other lien-holders entitled to the benefit of the action," it was held that in a case where a lien had been discharged the day before proceedings had commenced and said lien had not been registered, it could not be added to the claim to give jurisdiction. *Watson v. Kennedy*, (1891) 11 C.L.T. 340. In *Hall v. Pilz*, (1886) 11 P.R. 449, where the words in question were "all



other registered lien-holders," they were construed to mean all who had an apparent right by virtue of the registration of their liens.

Under a Manitoba Act, after a bill filed and *lis pendens* registered, another lien-holder filed a bill and obtained a decree first and applied to have his costs added to his lien, but this application was refused. Section 24 of the Manitoba Act qualifies section 9 of that Act. *Henry v. Bowes*, (1883) 3 C.L.T. 606.

Lien-holders not parties to the action must see that it is prosecuted to judgment or it may be dismissed or compromised. *Smith v. Doyle*, (1879) 4 A.R. 477.

**33. Who may try action to enforce lien.**—An action to enforce a lien may be tried by the Master in Ordinary, a Local Master of the High Court, an Official Referee, or a judge of the County Court, in any county or judicial district in which the lands are situate; or by a judge of the High Court of Justice at any sittings of that court for the trial of actions. 59 V. c. 35, s. 31.

(a) "*In which the lands are situate.*"—Under a former Act it was held that the lien should be enforced in the Division Court for the division in which the cause of action arose and defendant resided. Where there was no machinery providing for the sale, the sale should be by the order of a judge acting as Master in Chancery. Dartnell, J. A form of order is given in this case. See R.S.O. (1877) ch. 120, sec. 12; 36 Vict. ch. 27, sec. 5; 38 Vict. ch. 20, sec. 10. *Burt v. Wallace*, (1881) 17 C.L.J. 70.

**34. Powers of certain officers.**—The Master in Ordinary, the Local Masters, Official Referees, and the County Judges, shall have, in addition to their ordinary powers, all the jurisdiction, powers and authority of the High Court or a judge thereof, and of the said Master in Ordinary, to try, and otherwise completely dispose of, an action to realize a lien, and all questions arising in such action, including the giving or refusing of the costs herein-after provided. 59 V. c. 35, s. 32; 60 V. c. 24, s. 7.

(a) *All the jurisdiction, powers and authority.*"—These words are amply sufficient to enable such officers to make any appointment or to grant any order necessary to dispose of all

questions in the action. See *Hall v. Hogg*, (1890) 14 P.R. 45; *Patten v. Laidlaw*, (1895) 26 O.R. 189. See also sections 41, 42 and 43 as to limitation of costs.

(b) "*Including the giving or refusing of the costs.*"—A certain sum was found due from the owner to the contractor and the latter was found indebted to other lien-holders. Payment of the former sum into court was ordered and made, the amount, however, being insufficient to pay the claims of lien-holders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into court. Held, that by the payment into court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten v. Laidlaw*, *supra*.

**35. Appointing day for trial.**—(1) After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases where it is desired to try the action other than at the ordinary sittings of the High Court, either party may apply to a judge or other officer who has the power to try the action, to fix a day for the trial thereof, and the said judge, or other officer, shall give an appointment fixing the day and place of trial, and on the day fixed, or on such other day to which the trial may be adjourned, shall proceed to try the action, and all questions which arise therein, or which are necessary to be tried, to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and at the trial he shall take all accounts, make all inquiries, and give all directions, and do all other things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action or who have been served with the notice of trial, and shall embody all the results in the judgment (Form 13).

(2) **Estate may be sold.**—The judge or officer who tries the action may order that the estate or interest charged with the lien may be sold, and when, by the judgment, a sale is directed of the estate or interest charged with the lien, the judge or officer who tries the action may direct the sale to take place at any time after judgment, allowing, however, a reasonable time for advertising such sale.

(3) **Sale of materials.**—The judge or officer who tries the action may also direct the sale of any materials and authorize the removal thereof.

(4) **Letting in lien-holders who have not proved their claims at trial.**—Any lien-holder, who has not proved his claim at the trial of an action to enforce a lien, on application to the judge, or officer who tried the action, on such terms as to costs and otherwise as may be just, may be let in to prove his claim at any time before the amount realized in the action for the satisfaction of liens has been distributed, and where such a claim is proved and allowed the judge or officer shall amend the judgment so as to include such claim therein.

(5) **Right of lien-holders to attend at trial.**—Any lien-holder for an amount not exceeding \$100, or any lien-holder not a party to the action, may attend in person at the trial of an action to enforce a lien, and on any proceedings in such action, or may be represented thereat or thereon by a solicitor or by an agent who is not a solicitor.

(6) **Report where sale is had.**—When a sale is had the judge or officer with whose approbation the lands are sold shall make a report on the sale and therein direct to whom the moneys in court shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in connection therewith, and where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons, with their amounts, who are entitled to recover the same, and the persons by the judgment

adjudged to pay the same, and such persons shall be entitled to enforce the same by execution or otherwise as a judgment of the court. 59 V. c. 35, s. 33.

(a) "*May apply to a judge or other officer.*"—See *Robock v. Peters*, (1900) 13 Man. 124. In *West v. Sinclair*, (1892) 12 C. L.T. 44; 28 C.L.J. 119, the jurisdiction of a Master under 53 Vict. ch. 37, to set aside a conveyance as fraudulent under Stat. Eliz. is considered. A Master in Chambers has jurisdiction to vacate registration of mechanics' liens under R.S.O. ch. 120, sec. 23. In *Re Peake*, (1886) 6 C.L.T. 596.

Under a former Act it was held that a Master had no jurisdiction to entertain summary proceedings to enforce a mechanics' lien action begun in the County Court, nor could he amend the heading of papers by substituting High Court for County Court. *Jacobs v. Robinson*, (1894) 16 P.R. 1.

In *Secord v. Trumm*, (1890) 20 O.R. 174, it was held that the Ontario Statute, 53 Vict. ch. 37, was intended to simplify procedure in the High Court alone, and that the Division and County Courts were unaffected by it.

In the High Court, proceedings to enforce a mechanics' lien must be taken under 39 Vict. ch. 45, as amended by 60 Vict. ch. 24.

A Master of the High Court of Justice has no jurisdiction as such to entertain a summary proceeding under 53 Vict. ch. 37, to enforce a mechanics' lien begun in a County Court. *Secord v. Trumm*, *supra*, followed. Nor can he confer jurisdiction upon himself by subsequently directing an amendment to the affidavit and papers filed by substituting the High Court for the County Court. *Jacobs v. Robinson*, (1894) 16 P.R. 1.

A County Court Judge has jurisdiction as Master of proceedings in High Court, but not if instituted in County Court. *In re Ribble v. Aldwell*, (1898) 18 C.L.T. 59.

In *Hutson v. Valliers*, (1892) 19 A.R. 154, it was held that R.S.O. ch. 126, sec. 23, does not give County and Division Courts jurisdiction in an action of account by lien-holder against mortgagee who has sold through powers in summary proceedings. Resort must be had to High Court for equitable relief. (McLennan, J., dissenting.)

(b) "*To fix a day for the trial.*"—There should be notice of



application to fix the day for trial. No judicial officer can fix the day for trial before another judicial officer. Counter-claim for damages for breach of contract may be asserted in mechanics' lien action. *Pilkington v. Brown*, (1898) 19 P.R. 337.

(c) "*Report on the sale.*"—See Con. Rules 743, 769. The Master's certificate is thus equivalent to a judgment of the court and may be so enforced.

(d) "*A judgment of the court.*"—A petition was presented by a judgment creditor to vacate the judgment so far as it affected petitioner. The judgment recited that petitioners had a lien and declared that plaintiffs and others were entitled to liens, but did not otherwise settle priorities. Petitioners had no notice of trial and did not appear. The trial took place on 30th June, 1903. The sheriff had petitioners *fi. fa.* on 15th June, 1903. It was ordered that the names of petitioners and all reference to their claim be struck out of the judgment. *Haycock v. Sapphire*, (1903) 2 O.W.R. 1177; 7 O.L.R. 21. Plaintiff claimed interest from date when lien arose. Held, that interest being an incident of the principal sum found due and unreasonably withheld is properly allowed and secured by the lien, but should be paid from date of action. *Metallic Roofing Co. v. Jamieson*, (1903) 2 O.W.R. 316.

A judgment by a claimant against the contractor is not conclusive upon the owner. It may be offered as evidence of the amount due, but it will not prevent the owner from showing that the claim is excessive to the knowledge of the claimant. *Taylor v. Wahl*, (1903) 69 N.J.L. 471.

**36. Notice of trial, and service of.**—The party obtaining an appointment fixing the day and place of trial shall, at least eight clear days before the day fixed for the trial, serve a notice of trial which may be in Form 10 in the schedule to this Act, upon the solicitors for the defendants who appear by solicitors, and on all lien-holders who have registered their liens as required by this Act, or who are known to him, and on all other persons having any charge or incumbrance, or claim on the said lands, who are not parties, or who, being parties, appear personally in the said action, and such service shall be personal unless otherwise di-

rected by the judge or officer who is to try the case, who may in lieu of personal service, direct in what manner the notice of trial may be served. 59 V. c. 35, s. 34.

(a) "*At least eight clear days.*"—Both the day of service and the day of trial are to be excluded from the eight days.

(b) "*Who have registered liens.*"—See *Robock v. Peters*, (1900) 13 Man. 124, and *Bunting v. Bell*, (1876) 23 Gr. 584.

(c) "*Persons having any charge or incumbrance.*"—"In proceedings under the Mechanics' and Wage-Earners' Act, section 36 seems to render it unnecessary to consider how far one or the other of these modes of procedure would have been the proper one to apply, for, as I have pointed out, it is the persons who are incumbrancers at the time fixed for the service of notice of trial and those only who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in." *Haycock v. Sapphire Corundum Co.*, (1903) 7 O.L.R. 21, *per Meredith, C.J.*, at p. 23.

**37. Consolidation of actions.**—When more than one action is brought to realize liens in respect of the same property, a judge or other officer having power to try such actions, may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate all such actions into one action, and may give the conduct of the consolidated action to any plaintiff he sees fit. 59 V. c. 35, s. 35.

(a) "*Consolidate all such actions.*"—As to the consolidation of actions generally, see Con. Rule 435, and notes in *Holmested & Langton's Judicature Act and Rules* (3rd ed.).

**38. Transferring carriage of proceedings.**—Any lien-holder entitled to the benefit of the action may apply for the carriage of the proceedings, and the judge, or any other officer having power to try the action, may thereupon make an order giving such lien-holder the carriage of the proceedings, and such lien-holder shall for all purposes thereafter be the plaintiff in the action. 59 V. c. 35, s. 36.

(a) "*Any lien-holder.*"—See note to section 32 (a).

**39. Where judgment of court of first instance to be final.**—(1) In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is \$100 or less, the judgment shall be binding, final, and without appeal, except, that the judge or officer who tried the same may, upon application within fourteen days after judgment is pronounced, grant a new trial. 59 V. c. 35, s. 38; 60 V. c. 24, s. 9.

(2) **Where appeal to Divisional Court final.**—In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than \$100 and not more than \$200, any person affected thereby may appeal therefrom to a Divisional Court, whose judgment shall be final and binding on the appellant, but the respondent may appeal therefrom to the Court of Appeal, whose judgment shall be final and binding on all parties. 60 V. c. 15, Sched. A (77); c. 24, s. 10 (1).

(3) **Appeal in other cases.**—In all other cases an appeal may be had in like manner and to the same extent as from the decision of a judge trying an action in the High Court without a jury. 60 V. c. 24, s. 10 (2).

(a) "*Is more than \$100.*"—The right of appeal is governed by the aggregate amount of the claims.

Con. Rule 826 is applicable to an appeal by the respondent in the court below from an order of the Divisional Court reversing the judgment upon the trial where the amount in question is more than \$100 and not more than \$200, and therefore security for the costs of such an appeal must be given unless otherwise ordered. *Sherlock v. Powell*, (1899) 18 P.R. 312.

(b) "*As from the decision of a judge trying an action in the High Court without a jury.*"—See Judicature Act, sec. 75 (1), and Con. Rule 787. See also the Supreme and Exchequer Court Act (R.S.C. ch. 135) and amendments thereto. See sections 24, 28; Cass. Pr. 14-17.

Under 53 Vict. ch. 37, secs. 13 and 35 it was held that section 35 of that statute applied to appeals from "Certificates,"

and not "Reports." An appeal from a report is to the judge in court under Rule 850. *Wagner v. O'Donnell*, (1891) 11 C.L.T. 962; 14 P.R. 254. The practice given is grafted on the ordinary practice of the court. See *Bickerton v. Dakin*, 20 O.R. 192, 695.

**40. Limit of fees in money or stamps.**—No fees in stamps or money shall be payable to any judge or other officer in any action brought to realize a lien under this Act, nor on any filing, order, record or judgment, or other proceeding in such action, excepting that every person other than a wage-earner shall, on filing his statement of claim where he is a plaintiff, or on filing his claim where he is not a plaintiff, pay in stamps one dollar on every one hundred dollars, or fraction of one hundred dollars, of the amount of his claim up to one thousand dollars. 59 V. c. 35, s. 37; 60 V. c. 24, s. 8.

(a) "*No fees in stamps or money.*"—See further as to fees, section 46 (2).

#### AMENDMENT OF 1901.

The above section was amended by Chapter 12 of the Statutes of Ontario for the year 1901, as follows:

"Section 40 of the Mechanics' and Wage-Earners' Lien Act is amended by adding thereto the following sub-section:

"(2) When the proceedings are commenced in the office of a Local Master and Deputy Registrar who is paid by fees, such amount shall be payable in cash to such Local Master and Deputy Registrar, instead of in stamps.

**41. Limit of costs to plaintiff.**—The costs of the action under this Act awarded by the judge or officer trying the action, to the plaintiffs and successful lien-holders shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge or other officer who tries the action may direct. 59 V. c. 35, s. 41.



(a) "*The costs of the action.*"—i.e., solicitors' costs. Court fees are dealt with by section 40. See section 44 for costs for drawing and registering or vacating the lien.

(b) "*Shall be apportioned and borne.*"—The officer can exercise a judicial discretion in fixing the costs.

Defendant amended defence by paying into court twenty per cent. and costs to date. Held, that subsequent costs were payable by defendant. *Ontario Paving Company v. Bishop*, (1904) 4 O.W.R. 34.

Costs of appeal are not included in costs which by section 41 shall not exceed twenty-five per cent. of amount of judgment. See costs of appeal, dealt with by section 45 and in discretion of court or judge. *Gearing v. Robinson*, (1900) 19 P.R. 192.

**42. Limit of costs to be awarded against plaintiffs.**—Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge or said other officer may direct. 59 V. c. 35, s. 42.

(a) "*The claim of the plaintiff and other claimants.*"—Actual disbursements under this section do not include counsel fees paid by solicitor to counsel, and, *a fortiori*, counsel fees charged by solicitor himself or his firm. *Cobban M. Co. v. Lake Simcoe Co.*, (1903) 5 O.L.R. 447.

**43. Costs where least expensive course not taken.**—In case the least expensive course is not taken by a plaintiff under this Act the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken. 59 V. c. 35, s. 43.

(a) See Con. Rules 1175; Holmested & Langton's Judicature Act and Rules (3rd ed.).

**44. Costs of drawing and registering and vacating registration of lien.**—Where a lien is discharged or vacated under section 27

of this Act or where in an action, judgment is given in favor of or against a claim for a lien, in addition to the costs of an action, the judge or other officer may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration of the lien. 60 V. c. 24, s. 11 (2).

(a) "*The costs of an action.*"—i.e., the costs dealt with by sections 41 and 42.

**45. Costs not otherwise provided for.**—The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the judge or officer to whom the application or order is made. 60 V. c. 24, s. 11 (1).

See sections 41, 42, 44, 46 (2).

**46. Payments out of court.**—(1) Excepting in actions tried by a judge of the High Court the judge or other officer who tries the action shall, where money has been paid into court and the time for payment out arrives, forward a requisition for cheques with a certified copy of his judgment, and (when one is made) of the report on sale, to the Accountant of the Supreme Court of Judicature who shall, upon receiving the said requisition and copy of the judgment and report (if any) make out and return to the said judge or officer cheques for the amounts payable to the persons specified in the requisition, and the said judge or officer on receipt of said cheques shall distribute them to the persons entitled. 59 V. c. 35, s. 45; 60 V. c. 24, s. 12.

(2) **Fees not to be payable on payments out of court.**—No fees or stamps shall be payable on any cheques or proceedings to pay money into court or obtain money out of court, in respect of a claim of lien, but sufficient postage stamps to prepay a return registered letter shall be enclosed with every requisition for cheques. 59 V. c. 35, s. 46; 60 V. c. 24, s. 13. \*

(a) *No fees or stamps.*"—See section 40.

**47. Form of judgment in favor of lien-holders.**—All judgments in favor of lien-holders shall adjudge that the person or persons personally liable for the amount of the judgment, shall pay any deficiency which may remain after sale of the property adjudged to be sold, and whenever on a sale of any property to realize a lien under this Act sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered by execution against the property of such person or persons. 59 V. c. 35, s. 47.

(a) “*Shall pay any deficiency.*”—This section gives to the lien-holder a right to judgment against the person in respect to whom his claim arises for any balance remaining due after realizing upon the lien. The lien-holder must first proceed against the property. If it is not sufficient he is entitled to judgment. A lien-holder may always abandon his claim to a lien and sue on his contract, but this and the succeeding section are the only provisions for recovering personal judgments in proceedings to enforce mechanics' liens.

**48. Personal judgment when claim for lien fails.**—Whenever in an action brought under the provisions of this Act any claimant shall fail for any reason to establish a valid lien he may nevertheless recover therein a personal judgment against any party or parties to the action for such sum or sums as may appear to be due to him and which he might recover in an action on contract against such party or parties. 59 V. c. 35, s. 48.

(a) “*Recover therein a personal judgment.*”—The debtor, however, must be a party to the proceedings. Under a section which provided that if the lien claimant shall fail for any reason to establish a valid lien he may recover judgment for such sums as are due him or which he might recover in an action on a contract, a defendant in an action to foreclose a mechanics' lien who has filed no lien as required by the mechanics' lien law is not entitled to recover a personal judgment though he might have a claim against the owner. *Deane Steam Pump Co. v. Clark*, 84 N.Y.S. 851.

**49. Forms.**—The forms in the Schedule hereto, or forms similar thereto or to the like effect, may be adopted in all proceedings under this Act. 59 V. c. 35, s. 49.

(a) "*May be adopted in all proceedings.*"—See *Crerar v. C.P.R. Co.*, (1903) 5 O.L.R. 383, 2 C.L.R. 107; *Wallis v. Skain*, (1892) 21 O.R. 532; *Craig v. Cromwell*, (1900) 32 O.R. 27, 27 A.R. 587. In *Craig v. Cromwell*, *supra*, Osler, J.A., referring to the notice required by sec. 11 (2), said (27 A.R. at p. 589): "It has been said that though no form is prescribed by sub-sec. 2, yet that as sec. 49 indicates that the forms mentioned in the schedule or forms similar thereto or to the like effect may be adopted 'in all proceedings' under the Act, the claimants should have tried to select and fit some form to the case. Perhaps a prudent lawyer could have done so, but it appears to me that the 'proceedings' referred to in sec. 49 are proceedings connected with the realizing of the lien and do not include the plain informal notice required by sec. 11 (2)."

In *Crerar v. C.P.R. Co.*, *supra*, Boyd, C., said: "But these forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been 'substantial compliance' to use the phrase found in sec. 19 (1) with the scheme of the Act."

In *Robock v. Peters*, (1900) 13 Man. 139, Killam, C.J., after quoting sec. 17 of the Manitoba Mechanics' Lien Act, which is similar to sec. 19 of the Ontario Act, said: "This latter clause appears divisible into two parts. First, only substantial compliance with secs. 15 and 16 is required, and secondly, no failure in such compliance, in however substantial a degree is to invalidate the lien, unless some party is prejudiced, provided there is registration of a claim. I think that the onus on the question of prejudice is upon the party objecting to the registered claim. The defect is not to invalidate the lien, unless in the opinion of the judge there is prejudice to some one. That is, the judge must positively form the opinion, for which purpose he must have some evidence, either direct or arising out of the circumstances and the nature of the defect. In the present case there is nothing to suggest that any of the parties interested saw the registered statement of claim or knew its contents or was in any way affected by the error."



It is probable that the decision in *Wallis v. Skain, supra*, holding that the omission by a sub-contractor of some particulars in his claim of lien for registration was fatal, would not be followed, in view of the terms of sec. 19, or its corresponding section as construed by the courts.

**50. Liens arising before Act comes into force.**—This Act shall not apply to liens arising before the 7th day of April, 1896, excepting that where no action has been commenced or proceeding instituted to realize a lien arising before the said day the procedure herein directed shall be adopted to realize the same.  
59 V. c. 35, s. 50.

**51. Mechanics entitled to lien on a chattel may sell the chattel if (after three months) payment is not made.**—(1) Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in the alteration and improvement in its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right in addition to all other remedies provided by law, to sell by auction the chattel or thing in respect of which the lien exists, on giving one week's notice by advertisement in a newspaper published in the municipality in which the work was done, or in case there is no newspaper published in such municipality, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence (if any) of the owner, if he be a resident of such municipality.

**Application of proceeds of sale.**—(2) Such mechanic or other person shall apply the proceeds of the sale in payment of the

amount due to him and the costs of advertising and sale, and shall upon application pay over any surplus to the person entitled thereto. 59 V. c. 35, s. 51.

(a) "*A lien upon such chattel.*"<sup>\*</sup>—See ch. 4, "Mechanics' Liens upon Personalty," *ante*, pp. 29, 30. The lien under this statute is of the same nature as it was at common law, and requires the same conditions to create it. *McDearmid v. Foster*, 12 Pac. Rep. 813. The term lien in the statute means the same thing it ever did. *Wenz v. McBride*, 36 Pac. Rep. 1105, 20 Colo. 195.

(b) "*Three months,*" i.e., calendar months. See The Interpretation Act, R.S.O. ch. 1, sec. 8, sub-sec. 15.

(c) "*The owner.*"—The word owner is not confined to the person who has the absolute right in the chattel, but also applies to the person who has possession and control of it. It does not necessarily mean absolute owner. Where the claimant does not know that any one else is the real owner it is enough to give the notice required by the section to the person with whom the contract is made. *Keith v. Maguire*, (1898) 170 Mass. 210. While the work on the chattel must be done under contract, the authority of the owner to do the work will be implied from circumstances which would not raise an implication of a contract by the owner to pay the charges to be enforced by a suit against him. *White v. Smith*, (1882) 44 N.J.L. 105.

(b) "*To sell the chattel.*"—At common law the lien merely implied a power to hold. The lien-holder cannot be the purchaser at such sale, unless empowered by statute.

(c) "*On giving one week's notice.*"—The notice should strictly follow the Act. See *Schultz v. Reddick*, (1878) 43 U.C.R. 155. In *Blanchard v. Ely*, (1901) 179 Mass. 586, where the statute required a demand to be delivered to the debtor or left at his usual place of abode if within the commonwealth or mailed by letter addressed to him at his usual place of abode without the commonwealth and deposited in the post office to be sent to him, and the lien claimant mailed the demand to the respondent addressed to his residence in the commonwealth, it was held that the delivery by the postal carrier satisfied the statute.

(d) "*Amount due to him.*"—A workman cannot claim for storage charges during detention of the chattel (*Bruce v. Ever-son*, 1 Cab. & E. 18), nor can he claim for other amounts due upon other work, nor can he recover until the work is complete according to the contract where he contracts to do an entire work for a specific sum. *Sinclair v. Bowles*, (1829), 9 B. & C. 92. See cases specified in chapter 4 at p. 50.

**52. How far Act applies to railways.**—The provisions of this Act so far as they affect railways under the control of the Dominion of Canada are only intended to apply so far as the legislature of this province has authority or jurisdiction in regard thereto. 59 V. c. 35, s. 6 (4).

See page 99, *ante*, where the question of jurisdiction is referred to.

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## CHAPTER 2 OF THE STATUTES OF ONTARIO, 1904.

*(An Act to Amend the Judicature Act.)**[Assented to 26th April, 1904.]*

**Additional jurisdiction under certain statutes.**—2. The Court of Appeal shall also have jurisdiction as provided by,

(j) The Mechanics' and Wage-Earners' Lien Act.

## SCHEDULE.

## FORM 1.

*(Section 17.)**Claim of Lien for Registration.*

A. B. (*name of claimant*) of (*here state residence of claimant,*) (*if so, as assignee of, stating name and residence of assignor*) under The Mechanics' and Wage-Earners' Lien Act claims a lien upon the estate of (*here state the name and residence of owner of the land upon which the lien is claimed,*) in the undermentioned land in respect of the following work [*service or materials*] that is to say (*here give a short description of the nature of the work done or materials furnished and for which the lien is claimed,*) which work [*or service*] was [*or is to be*] done [*or materials were furnished*] for (*here state the name and residence of the person upon whose credit the work is done or materials furnished,*) on or before the day of

The amount claimed as due [*or to become due*] is the sum of \$

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

*When credit has been given, insert:* The said work was done [*or materials were furnished*] on credit, and the period of credit agreed to expired [*or will expire*] on the day of

, 18 .

Dated at this day of , A.D. 18 .  
(*Signature of claimant.*)



## FORM 2.

(Section 17.)

*Claim of Lien for Wages, for Registration.*

A. B. (name of claimant) of (here state residence of claimant,) (if so, as assignee of, stating name and residence of assignor) under The Mechanics' and Wage-Earners' Lien Act claims a lien upon the estate of (here state the name and residence of the owner of land upon which the lien is claimed,) in the undermentioned land in respect of                      days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done) on or before the                      day of                      .

The amount claimed as due is the sum of \$                      .

The following is the description of land to be charged, (here set out a concise description of the land to be charged sufficient for the purpose of registration.)

Dated at                      this                      day of                      .  
(Signature of claimant.)

## FORM 3.

(Section 18.)

*Claim of Lien for Wages by Several Claimants.*

The following persons under The Mechanics' and Wage-Earners' Lien Act claim a lien upon the estate of (here state the name and residence of the owner of land upon which the lien is claimed) in the undermentioned land in respect of wages for labor performed therein while in the employment of (here state name and residence or names and residences of employers of the several persons claiming the lien).

A. B. of (residence) \$                      for                      days' wages.

C. D. of (residence) \$                      for                      days' wages.

E. F. of (residence) \$                      for                      days' wages.

The following is the description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at                      this                      of                      .  
(Signatures of the several claimants.)

## FORM 4.

(Section 17.)

*Affidavit Verifying Claim for Registration.*

I, A. B., named in the above (or annexed) claim, do make oath that the said claim is true.

Or, We, A. B. and C. D., named in the above (or annexed) claim, do make oath, and each for himself says that the said claim, so far as relates to him, is true.

[Where affidavit made by agent or assignee a clause must be added to the following effect:—I have full knowledge of the facts set forth in the above (or annexed) claim.]

Sworn before me at \_\_\_\_\_, in the  
county of \_\_\_\_\_, this  
day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

Or, The said A. B. and C. D. were  
severally sworn before me at \_\_\_\_\_, in  
the county of \_\_\_\_\_, this \_\_\_\_\_ day  
of \_\_\_\_\_, A.D. 18 \_\_\_\_.

Or, The said A. B. was sworn before  
me at \_\_\_\_\_, in the county of \_\_\_\_\_,  
this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 18 \_\_\_\_.

(a) As to the persons before whom the affidavit may be sworn: see *ante*, sec. 17, note (j), p. 130.

## FORM 5.

(Section 31.)

*Affidavit Verifying Claim in Commencing an Action.*

(Style of Court and Cause.)

I, \_\_\_\_\_, make oath and say, that I have read, or heard read, the foregoing statement of claim, and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all the sums of money or goods or merchandise to which (*naming the debtor*) is entitled to credit as against me.

59 V. c. 35, Sched. Forms 1-5.

## FORM 6.

(Sections 23 and 24.)

*Certificate for Registration.*

(Style of Court and Cause.)

(Date .)

I certify that the above named plaintiff has commenced an action in the above court to enforce against the following land (*describing it*) a claim of mechanics' lien for \$ .

60 V. c. 15, Sched. A (76).

## FORM 7.

(Section 31.)

*Defence.*

(Style of Court and Cause.)

A. B., disputes that the plaintiff is now entitled to a mechanics' lien on the following grounds: (*Setting forth the grounds shortly.*)

(a) The lien has not been prosecuted in due time as required by statute.

(b) That there is nothing due to the plaintiff.

(c) That the plaintiff's lien has been vacated and discharged.

(d) That there is nothing due by (the owner) for the satisfaction of the plaintiff's claim.

Delivered on the day of by A. B. in person, whose address for service is (*stating address within two miles of the court house*), or

Delivered on the day of by Y. Z., solicitors for the said A. B.

NOTE.—If the owner does not dispute the lien entirely and only wishes to have the accounts taken he may use Form 8.

## FORM 8.

(Section 31.)

*Defence where there are no matters disputed or where the matters in dispute are matters of account.*

(Style of Court and Cause.)

A. B. admits that the plaintiff is entitled to a lien and claims that the following is a just and true statement of the account in question:—

Amount of contract price for work contracted to be performed by E. F. as plumber on the lands in question herein. . . . . \$500 00

Amounts paid on Account.

June 1st, 1889, paid E. F. . . . . \$200 00

July 1st, 1889, paid G. H. and I. K., sub-contractors of E. F. . . . . 100 00

————— \$300 00

Balance admitted to be due. . . . . \$200 00

For satisfaction of lien of plaintiff and other lien-holders (*as the case may be*) A. B., before action tendered to the plaintiff \$ in payment of his claim and now brings into court \$ and submits that that amount is sufficient to pay the plaintiff's claim, and asks that this action be dismissed as against him with costs.

Delivered, etc.

## FORM 9.

(Section 49.)

*Affidavit of Owner Verifying Account.*

(Style of Court and Cause.)

I, A. B., of , being the owner of the lands in question in this action, make oath and say: That the account set forth in the foregoing defence is a just and true account of the amount of the contract price agreed to be paid by me to E. F. for the work contracted to be done by him on the lands in question.



The said account also justly and truly sets forth the payments made by me on account thereof, and the person or persons to whom the same were made; and the balance of [\$200] appearing by such account to be still due and payable is the just and true sum now due and owing by me in respect of my contract with the said E. F.

Sworn, etc.

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FORM 10.

(Section 36.)

*Notice of Trial.*

(Style of Court and Cause.)

Take notice that this action will be tried at the Court House, in the Town of , in the County of , on the day of , by , and at such time and place the will proceed to try the action and all questions which arise in or which are necessary to be tried to completely dispose of the action and to adjust the rights and liability of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all inquiries and give all directions and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions, and accounts arising in said action and will give all necessary relief to all parties.

And further take notice that if you do not appear at the trial and prove your claim, if any, or prove your defence, if any, to the action the proceedings will be taken in your absence and you may be deprived of all benefit of the proceedings and your rights disposed of in your absence.

This is a mechanics' lien action brought by the above named plaintiff against the above named defendants to enforce a mechanics' lien against the following lands:—(*set out description of lands.*)

This notice is served by, etc.

## FORM 11.

(Section 49.)

*Statement of Account by Lien-holders, not parties to the action.*

(Style of Court and Cause.)

E. F.

Dr. to G. H.

1889.

Jan. 1, To 12 doz. brackets.....	\$12 00
Feb. 3, To 50 lbs. of nails.....	5 00
Oct. 3, To 60 sheets of glass.....	40 00
	<hr/>
	\$57 00

Cr.

1889.

Feb. 4, By cash.....	\$ 4 00
June 5, By goods.....	20 00
	<hr/>
	\$24 00
	<hr/>
	\$33 00

## FORM 12.

(Section 49.)

*Affidavit of Lien-holder Verifying Claim.*

(Style of Court and Cause.)

I, G. H. of (*address and occupation*), make oath and say:—  
 I have in the foregoing account (*or in the account now shown to be marked A*) set forth a just and true account of the amount due and owing to me by E. H. (*the owner*) [*or by E. F., who is a contractor with the defendant, L. G. (the owner),*] of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise to which the said E. F. is justly entitled to credit in respect of the said account and the sum of \$33 appearing by such account to be due to me as the amount (*or balance*) of such account is now justly due and owing to me.

Sworn, etc.

## FORM 13.

(Section 35.)

*Judgment.*

In the High Court of Justice.

Monday, the 10th July, 1896.

Name of Judge or officer.

William Spencer, Plaintiff,  
and  
Thomas Burns, Defendant.

This action coming on for trial before  
in at upon opening of the  
matter and it appearing that the following persons have been  
duly served with notice of trial herein, (*set out names of all persons served with notice of trial*) and all such persons (*or as the case may be*) appearing at the trial [*if so* and the following persons not having appeared *set out names of non-appearing persons*] and upon hearing the evidence adduced and what was alleged by counsel for the plaintiff and for C. D. and E. F. and the defendant. [*if so* and by A. B. appearing in person.]

1. This court doth declare that the plaintiff and the several persons mentioned in the first schedule hereto are respectively entitled to a lien under The Mechanics' and Wage-Earners' Lien Act, upon the lands described in the second schedule hereto, for the amounts set opposite their respective names in the 2nd, 3rd and 4th columns of the said 1st schedule, and the persons primarily liable for the said claims respectively are set forth in the 5th column of the said schedule.

2. [And this court doth further declare that the several persons mentioned in schedule 3 hereto are also entitled to some lien, charge or incumbrance upon the said lands for the amounts set opposite their respective names in the 4th column of the said schedule 3, *according to the fact.*]

3. And this court doth further order and adjudge that upon the defendant (A. B. the owner) paying into court to the credit of this action the sum of (*gross amount of liens in schedules 1 and 3 for which owner is liable*) on or before the day of next, that the said liens in the said 1st schedule mentioned be and the same are hereby discharged, [and the several persons in the said 3rd schedule are to release and discharge their said claims and assign and convey

the said premises to the defendant (*owner*) and deliver up all documents on oath to the said defendant (*owner*) or to whom he may appoint] and the said moneys so paid into court are to be paid out in payment of the claims of the said lien-holders (*if so, and incumbrancers*).

4. But in case the said defendant (*owner*) shall make default in payment of the said moneys into court as aforesaid, this court doth order and adjudge that the said lands be sold with the approbation of the Master of this court at \_\_\_\_\_ and that the purchase money be paid into court to the credit of this action and that all proper parties do join in the conveyances as the said Master shall direct.

5. And this court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in the said 1st [and 3rd] schedule[s] mentioned as the said Master shall direct, with subsequent interest and subsequent costs to be computed and taxed by the said Master.

6. And this court doth further order and adjudge that in case the said purchase money shall be insufficient to pay in full the claims of the several persons mentioned in the said 1st schedule, the persons primarily liable for such claims as shown in the said 1st schedule do pay to the persons to whom they are respectively primarily liable the amount remaining due to such persons forthwith after the same shall have been ascertained by the said Master.

7. [And this court doth declare that \_\_\_\_\_ have not proved any lien under The Mechanics' and Wage-Earners' Lien Act, and that they are not entitled to any such lien, and this court doth order and adjudge that the claims of liens respectively registered by them against the lands mentioned in the said 2nd schedule be and the same are hereby discharged, *according to the fact.*]



## SCHEDULE 1.

Names of lien holders entitled to mechanics' liens.	Amount of debt and interest (if any).	Costs.	Total.	Names of primary debtors.

(Signature of officer issuing judgment.)

## SCHEDULE 2.

The lands in question in this matter are

*(Set out by a description sufficient for registration purposes.)*

(Signature of officer issuing judgment.)

## SCHEDULE 3.

Names of persons entitled to incumbrances & other than mechanics' liens.	Amount of debt and interest (if any).	Costs.	Total.

(Signature of officer issuing judgment.)

## FORM 14.

(Section 27.)

*Certificate Vacating Lien.*

(Style of Court and Cause.)

Date

I certify that the defendant A. B. (*the owner*) has paid into court to the credit of this cause all money due and payable by him for the satisfaction of the liens of the plaintiff and E. F., G. H., I. J. and K. L. and their liens are hereby vacated and discharged so far as the same affect the following lands (*describe lands*).

(*Signature of Master or Referee.*)

## FORM 15.

(Section 27.)

*Certificate Vacating Lien.*

(Style of Court and Cause.)

Date

I certify that I have inquired and find that the plaintiff is not entitled to a mechanics' lien upon the lands of the defendant A. B. (*the owner*) and his claim of lien is hereby vacated and discharged so far as the same affects the following lands (*describe lands*).

(*Signature of Master or Referee.*)

59 V. c. 35, Schedule, Forms 13, 14.

THE MECHANICS' AND WAGE-EARNERS' LIEN ACT  
OF MANITOBA.

CHAPTER 110, REVISED STATUTES OF MANITOBA, 1902.

HIS MAJESTY, by and with the advice and consent of the  
Legislative Assembly of Manitoba, enacts as follows:—

## SHORT TITLE.

1. **Short title.**—This Act may be cited as “The Mechanics’ and Wage-Earners’ Lien Act.” 61 V. c. 29, s. 1, *part*.

## INTERPRETATION.

2. **Interpretation.**—In this Act, unless the context otherwise requires—

(a) **“Contractor.”**—The expression “contractor” means a person contracting with or employed directly by the owner or his agent for the doing of work or placing or furnishing of materials for any of the purposes mentioned in this Act;

(b) **“Sub-contractor.”**—The expression “sub-contractor” means a person not contracting with or employed directly by the owner or his agent for the purpose aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor;

(c) **“Owner.”**—The expression “owner” extends to and includes any person, firm, association, body corporate or politic, including a municipal corporation, having any estate or interest in the lands upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is com-

menced or the materials furnished have been commenced to be furnished;

(d) "**Person.**"—The expression "person" extends to and includes a body corporate or politic, a firm, partnership or association;

(e) "**Material.**"—The expression "material" includes every kind of movable property;

(f) "**Registry office.**"—The expression "registry office" includes a land titles office;

(g) "**Registrar.**"—The expression "registrar" includes a district registrar;

(h) "**Wages.**"—The expression "wages" means money earned by a mechanic or laborer for work done, whether by the day or as piece work. 61 V. c. 29, s. 2, s. 12, s.-s. 6.

See Ont. Act, sec. 2. This section differs from the corresponding Ontario section in omitting "railway company" from the definition of owner.

A foreign unlicensed corporation is entitled to acquire a lien under this Act: see *Bank of Montreal v. Condon*, (1896) 11 Man. 366.

#### ORIGIN AND NATURE OF LIENS.

3. **Contracts not to deprive third party of lien.**—No agreement shall be held to deprive anyone otherwise entitled to a lien under this Act, and not a party to the agreement, of the benefit of the lien; but the lien shall attach, notwithstanding such agreement. 61 V. c. 29, s. 3.

See Ont. Act, s. 6.

A contractor cannot bind any sub-contractor by any such agreement. *Anly v. Holy Trinity Church*, (1885) 2 Man. 248.

A lien for materials only arises where the goods are supplied for the purpose of being used in the particular building on which the lien is claimed. *Sprague v. Besant*, (1885) 3 Man. 519. See Ont. Act, s. 4 (e), "to be used."



**4. Nature of lien.**—Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of, any erection, building, land, wharf, pier, bulkhead, bridge, trestle-work, vault, mine, well, excavation, side-walk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed or way, or the appurtenances to any of them, for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, land, wharf, pier, bulkhead, bridge, trestle-work, vault, mine, well, excavation, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, and appurtenances thereto, and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the said work or service is performed, or upon which such materials are placed, or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner:

**No lien for sum under \$20.**—Provided that no such lien shall exist under this Act for any claim under the sum of twenty dollars.

(a) Such lien, upon registration as hereinafter provided, shall arise and take effect from the date of the commencement of such work or service, or from the placing of such materials, as against purchasers, chargees or mortgagees under instruments, registered or unregistered. 61 V. c. 29, s. 4.

This section omits the words “railway,” “fence” and “fruit and ornamental trees,” which are included in the Ontario section.

See Ont. Act, s. 4. Sub-section (a) is not in the Ontario Act, which omits also the limitation of liens to claims for twenty dollars and upwards.

A contractor cannot enforce a lien for more than the amount

actually due according to the contract. *Brydon v. Lutes*, (1891) 9 Man. 463; *McArthur v. Dewar*, (1885) 3 Man. 72.

Municipal buildings have in Manitoba been held to be subject to mechanics' liens. *McArthur v. Dewar*, (1885) 3 Man. 72; *McLennan and Winnipeg*, (1882) 3 Man. 74.

Proceedings were taken to enforce a mechanics' lien by levy, after winding-up order had been made. Held, that neither sec. 16 nor 17 of the Winding-up Act could be invoked against proceedings. Sections 62 and 66 of that Act should be read together. The lien was not created by the proceedings but prior to that time; hence, sec. 66 did not take it away. *Re Empire Brewing & Malting Co.*, (1891) 8 Man. 424.

In *Moore v. Bradley*, (1887) 5 Man. 49, Dubuc, J., held that a public school building was not exempt from the operation of the mechanics' lien law, but decisions elsewhere are opposed to this view. See Ontario Act, sec. 4 (h).

A sub-contractor is entitled to a lien even though the contractor under whom he claims has agreed with the owner that no workman shall be entitled to a lien. *Anly v. Holy Trinity Church*, (1885) 2 Man. 248.

In *Robock v. Peters*, (1900) 13 Man. 124, Killam, J., points out a difference in the phraseology of sec. 4 (a) and sec. 5 (b), and says: "The difference is probably inadvertent, but liens are purely statutory and must be strictly followed as in derogation of ordinary rights."

The claim of a lien-holder is a preferential claim under The Dominion Winding-up Act (R.S.C. ch. 129). *Re Empire Brewing & Malting Co.*, (1891) 8 Man. 424.

Under a former Act it was held that a lien had no existence until it was registered. *Kievell v. Murray*, (1884) 2 Man. 209.

A lien for materials only arises where the goods are supplied for the purpose of being used in the particular building on which the lien is claimed. *Sprague v. Besant*, (1885) 3 Man. 519.

The court has no jurisdiction to enforce a lien out of its territorial jurisdiction. *Chadwick v. Hunter*, (1884) 1 Man. 363.

A mechanics' lien registered against two lots owned by different persons, in respect to work done upon two houses, one on each of the lots, on the order of one of the owners, and for an amount claimed to be due for work on both houses, without apportioning the same, cannot be enforced, nor can effect be given to the lien

as against one of the lots only, for the proper amount. *Fairclough v. Smith*, (1901) 13 Man. 509.

As to construction of word "claim," see *Phelan v. Franklin*, (1905) 2 W.L.R. 29.

**5. Property upon which lien shall attach.**—The lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, sidewalk, paving fountain, fishpond, drain, sewer, aqueduct, roadbed or way, and the appurtenances thereto, upon or in respect of which the work or service is performed or the materials are placed or furnished to be used, and the lands occupied thereby or enjoyed therewith.

(a) **Where estate charged is leasehold.**—In cases where the estate or interest charged by the lien is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to said lien, provided such consent is testified by the signature of such owner upon the claim of the lien at the time of the registering thereof, and duly verified.

(b) **Mortgaged land.**—In case the land upon in respect of which the work is done, or materials or machinery are placed, be incumbered by a mortgage or other charge existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, such mortgage or other charge shall have priority over a lien under this Act to the extent of the actual value of such land at the time the improvements were commenced. 61 V. c. 29, s. 5.

Compare Ontario Act, sec. 7 (1), and see cases thereunder.

See *Flack v. Jeffrey*, (1895) 10 Man. 514; and *In re Empire Brewing & Malting Co.*, (1891) 8 Man. 424.

The lien attaches from the placing of the materials. *Robock v. Peters*, (1900) 13 Man. 124. See statement of this case under section 20, *post*.

It is probable that though the contract is never carried out the lien-holder may assert his lien upon the increase in value against the vendor as if the relationship had been that of mortgagor and mortgagee. *Hoffstrom v. Stanley*, (1902) 14 Man. 227.

**6. Application of insurance when lien attaches.**—Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in sub-section (b) of the last preceding section, be subject to the claims of all persons for liens to the same extent as if such moneys were realized by a sale of such property in an action to enforce a lien. 61 V. c. 29, s. 6.

See Ont. Act, sec. 8, to the same effect.

**7. Limit of amount of lien.**—Save as herein provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. 61 V. c. 29, s. 7.

See Ont. Act, sec. 9, to the same effect.

The contractor cannot by release or assignment of his rights under his contract with the owner, defeat the registered lien of a sub-contractor claiming under him. *Anly v. Holy Trinity Church*, (1885) 3 Man. 193, decided under a former Act is no longer applicable, in view of present section 4 (2).

**8. Limit of lien when claimed by some other contractor.**—Save as herein provided, where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been placed or furnished. 61 V. c. 29, s. 8.

See Ont. Act, sec. 10, to the same effect.

See *Black v. Wiebe*, (1905) 1 W.L.R. 75, reported fully under section 12, *post*.

**9. Percentage to be deducted and retained by owner.**—In all cases the person primarily liable upon any contract under or by



virtue of which a lien may arise under the provisions of this Act shall, as the work is done or the materials are furnished under any contract, deduct from any payments to be made by him in respect of such contract, and retain for a period of thirty days after the completion or abandonment of the contract, twenty per cent. of the value of the work, service and materials actually done, placed or furnished, as defined by the fourth section of this Act, and such value shall be calculated on the basis of the price to be paid for the whole contract.

(a) Provided that, when any contract exceeds fifteen thousand dollars, the amount to be retained shall be fifteen per cent., instead of twenty per cent.

(b) The liens created by this Act shall be a charge upon the amounts directed to be retained by this section, in favor of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(c) All payments, up to eighty per cent. (or eighty-five per cent. where the contract price exceeds fifteen thousand dollars) of such value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing of such lien given by the person claiming the lien to the owner, contractor or the sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act.

(d) Payment of the percentage required to be retained under this section may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned herein, unless in the meantime proceedings have commenced under this Act to enforce any lien or charge against such percentage as provided by sections twenty-one and twenty-two of this Act. 61 V. c. 29, s. 9.

See Ont. Act, sec. 11, to the same effect.

After bill filed and *lis pendens* registered another lien-holder

filed a bill and obtained decree first. The latter claimed to have his costs added to his lien. The application was refused. Section 24, *post*, qualifies this section. *Henry v. Bowes*, (1883) 3 C.L.T. 606.

See *Smith Co. v. Sissiboo Co.*, 36 N.S.R. 348. On appeal in this case (1904) 35 S.C.R. 93, Nesbitt, J., said, in referring to section 8 of the Nova Scotia Act, which is similar to section 9 of the Manitoba Act: "The only ground upon which the plaintiffs can hope to maintain a lien as against the defendant company would be that section 8 of the Act applies, but we think that that section does not by its terms apply to a case where there was no price specified or capable of being ascertained, for the erection of the building, but the contract price of the building was blended with considerations for other matters from which it could not be separated."

As to retention of percentages, see *Carroll v. McVicar*, (1905) 2 W.L.R. 25; 41 C.L.J. 668.

**10. Payment made in good faith without notice of lien.**—In case an owner or contractor chooses to make payments to any persons referred to in the fourth section of this Act for or on account of any debts justly due to them for work or service done or for materials placed or furnished to be used as therein mentioned, and shall within three days afterwards give, by letter or otherwise; to the contractor or his agent, or to the sub-contractor or his agent, as the case may be, written notice of such payments, such payments shall as between the owner and contractor, or as between the contractor and the sub-contractor, as the case may be, be deemed to be payments to the contractor or sub-contractor, as the case may be, on his contract generally, but not so as to affect the percentage to be retained by the owner, as provided by the last preceding section. 61 V. c. 29, s. 10.

See Ont. Act, sec. 12, to the same effect.

**11. Priority of lien.**—The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing

of such lien to the person making such payments or after registration of such lien as hereinafter provided.

(a) **Agreements for purchase, part of purchase money unpaid.**—In case of an agreement for the purchase of land, and the purchase money or part thereof being unpaid and no conveyance made to the purchaser, the purchaser shall, for the purposes of this Act and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee.

(b) **Priority among lien-holders.**—Excepting where it is otherwise declared by this Act, no person entitled to a lien on any property or to a charge on any moneys under this Act shall be entitled to any priority or preference over another person of the same class entitled to a lien or charge on such property or moneys under this Act, and each class of lien-holders, except where it is otherwise declared by this Act, shall rank *pari passu* for their several amounts, and the proceeds of any sale shall, subject, as aforesaid, be distributed among the lien-holders *pro rata*, according to their several classes and rights. 61 V. c. 29, s. 11.

See Ont. Act, sec. 13, to the same effect. See also *Hoffstrom v. Stanley*, (1902) 14 Man. 227, 22 C.L.T. 357.

**12. Priority of lien for wages.**—Every mechanic or laborer whose lien is for work done for wages shall, to the extent of thirty days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, of the contract price directed by the ninth section of this Act to be retained, to which the contractor or sub-contractor through whom such lien is derived is entitled, and all such mechanics and laborers shall rank *pari passu* on said twenty per cent. or fifteen per cent., as the case may be.

(a) **Enforcing lien in such cases.**—Every wage-earner shall be entitled to enforce a lien in respect of the contract not completely fulfilled.

(b) **Calculating percentage when contract not fulfilled.**—In case of the contract not having been completely fulfilled when the lien is claimed by wage-earners, the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor or sub-contractor by whom such wage-earners are employed.

(c) **Percentage not to be otherwise applied.**—Where the contractor or sub-contractor makes default in completing his contract, the percentage aforesaid shall not, as against a wage-earner claiming a lien under this Act, be applied to the completion of the contract or for any other purpose by the owner or contractor, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim of any kind against the contractor or sub-contractor.

(d) **Devices to defeat priority of wage-earners.**—Every device by an owner, contractor or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall, as respects such wage-earners, be null and void. 61 V. c. 29, s. 12, s.-ss. 1-5.

See Ont. Act, sec. 14, and sec. 2 (6).

Defendant agreed to purchase land from D. & McC., price to be paid 15th August, 1901. In default D. & McC. could either cancel agreement forfeiting any payments made, or re-sell and recover any deficiency from defendant. Defendant made improvements on land and employed plaintiff as a carpenter. Plaintiff claims lien for wages. No part of purchase money was paid. Work went on after 15th August with concurrence of D. & McC. Held, that parties must be regarded as mortgagor and mortgagee. D. & McC. having granted extension could not cancel without giving more time, hence agreement was still subsisting when plaintiff did the work. Plaintiff was entitled to the lien, subject to charge of D. & McC. for unpaid purchase money and interest. *Hoffstrom v. Stanley*, (1902) 14 Man. 227; 22 C.L.T. 337.

In *Black v. Wiebe*, (1905) 1 W.L.R. 75, the facts were as fol-



lows: The defendants, Wiebe and Jardine, entered into an agreement with the defendant, Kate Hubert, to erect for her a house on land belonging to her on S. Avenue, Winnipeg. The agreement under which the work was to be done was contained in a written contract, to which the plans and specifications of the building were attached, forming a part of the agreement. The contract price was \$2,600, payable \$30 on the execution of the contract, \$470 when the roof was covered in, \$1,500 "on or before the completion of the building," and the balance as should be arranged between the parties. The \$1,500 was to be raised by a loan on the premises, the contractor to receive an order for the proceeds of the loan. The plaintiff supplied the lumber for the erection of the house and also for the erection of a barn upon the same lot. The lumber was supplied upon the order of the contractors and pursuant to an arrangement made between them and the plaintiffs. The house was never fully completed, but when partially finished was occupied by Mrs. Hubert. The specifications were departed from in certain particulars with the assent, as was alleged, of the proprietress. The quality of the work and material was not in accordance with the contract. Although it was alleged that a stone foundation had been put in as an extra, the evidence showed that the building as it stood was, owing to defects, not worth more than \$2,000. A mortgage for \$1,000 was placed on the property and the proceeds applied on the contract. The plaintiffs received a portion of these proceeds, and the balance remaining unpaid was \$321.66. Part of the lumber supplied went into the construction of the barn. The plaintiffs' lien did not include the barn, but only referred to material used in the erection of the house. The value of the lumber used for the barn was \$100, leaving \$221.66 as the amount proved by the plaintiffs under the lien. Several other liens were filed by other parties.

Perdue, J., having stated the above facts in his judgment, said:

"It is urged on behalf of the owner that as the house has never been completed there is nothing due to the contractors, and that sub-contractors are, under section 8 of the Mechanics' and Wage-Earners' Lien Act, limited to the amount owing to the contractors. Section 12 of the Act introduces special provisions for the protection of wage-earners and provides for the enforcement of the lien in their favor in respect to a contract not completely

fulfilled. It also provides that in such cases the wage-earners may enforce their liens against the percentage required to be retained by the proprietor, and this percentage was, in the case of a contract not completely fulfilled, to be calculated on the work done or materials furnished by the contractor. The insertion in the Act of the provisions contained in section 12 shows that the protection extended to the lien-holder of giving him a right to enforce his lien derived through a contractor, where the contractor has not fulfilled the contract, is limited to claims for wages. Where, however, the money is payable under a contract by instalments as the work progresses, the general lien-holders may enforce their liens to the extent of the instalments earned in so far as the same remain unpaid in the hands of the proprietor. *Brydon v. Lutes*, (1891) 9 Man. 463.

It was urged on behalf of the plaintiffs that the owner had accepted the work by occupying the house and by mortgaging the same. It is clear that the mortgage was in pursuance of a term in the contract in order to raise money to pay the contractors, and that this was done during the progress of the construction. The giving of the mortgage could not, therefore, be taken as an acceptance of the whole work. There is a wide difference between the receiving and retaining of a chattel and the occupation of a building erected upon the land of the occupant, in respect of the inference of acceptance from the act of the party. This has been clearly pointed out in *Pattison v. Luckley*, L.R. 10 Ex. 330; *Sumpter v. Hedges*, (1898) 1 Q.B. 673, and other cases. The building, although incomplete and unsatisfactory, is upon the owner's land and is perhaps partly paid for. The owner may, although protesting against its incomplete or unsatisfactory state, be compelled to use and occupy it, unless he abandons his land until the dispute is settled. Occupation under these conditions should not be construed as an acceptance. The contract in the case provided that \$30 should be paid on execution of the instrument, and this payment has been made. A second payment of \$470 was to be made when the roof was covered in. This payment became due and the contractors received on account of it the equivalent of \$200, leaving the sum of \$270 still due and available for lien-holders. The proceeds of the mortgage were not applicable on this, but on the \$1,500, under the terms of the contract. The further sum of \$1,500 was payable 'on or before the completion of the building.' As the owner had the option of

paying this sum either before the completion of the building or upon its completion, it is manifest that she is not legally compellable to pay the amount until the longer period had elapsed, and that payment cannot be enforced until the building has been completed." For other cases showing that mere occupation of the house does not constitute acceptance, see citations under section 4 of the Ontario Act, at p. 66.

**13. Attempting to remove material affected by lien.**—During the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien, and any attempts at such removal may be restrained on application to the Court of King's Bench, or to a judge or local judge thereof, having power to try an action to realize a lien under this Act.

(a) **Costs.**—The court, judge or local judge to whom any such application is made, may make such order as to the costs of and incidental to the application and order as he deems just.

(b) **Goods furnished for certain purposes not to be subject to execution.**—When any material is actually brought upon any land to be used in connection with such land for any of the purposes enumerated in the fourth section of this Act, the same shall be subject to a lien in favor of the person supplying the same until put in the building, erection or work. 61 V. c. 29, s. 13.

See Ont. Act, sec. 16, to the same effect as this section, with the exception of (b), which contains a substantial variation.

#### *Registration of Lien.*

**14. Office of registration.**—A claim for lien may be registered in the land titles office in which instruments or dealings affecting the lands affected or proposed to be affected thereby are to be registered. If such lands have been brought, or if application has been made to bring them, under the operation of the Real Property Act, and if the lands have not been so brought nor application made therefor, then such statement shall be registered in the registry office or land titles office for the registration district

or land titles district in which such lands are situate. If the lands be partly under the operation of the said act and partly not, each portion shall be affected only by registration in the proper office. 61 V. c. 29, s. 14.

See Ont. Act, sec. 17, to the same effect.

**15. Registration of claim for lien.**—A claim for lien shall state:

(a) The name and residence of the person claiming the lien and of the owner of the property to be charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property to be charged) and of the person for whom and upon whose credit the work (or service) is done, or materials are furnished or placed, and the time or period within which the same was, or was to be, done or furnished or placed.

(b) A short description of the work (or service) done, or the materials furnished or placed, or to be furnished or placed.

(c) The sum claimed as due or to become due.

(d) A description of the land to be charged, sufficient for the purpose of registration.

(e) The date of expiry of the period of credit (if any) agreed by the lien-holder for payment for his work (or service) or materials, where credit has been given.

(f) **Form of claim.**—The claim may be in one of the forms given in Schedule A to this Act, and shall be verified by the affidavit of the person claiming the lien or of his agent or assignee having a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge. 61 V. c. 29, s. 15.

See Ont. Act, sec. 17 (a), to the same effect, except that clause (3) of that Act, providing for the registration of liens against railway companies is omitted here.

The claim need not give details of the work and materials.



See Form No. 1 in the Schedule, and *Irwin v. Beynon*, (1886) 4 Man. 10.

“Objection is taken to the description of the residence of the claimant, which should state in what part of the town of Minnedosa he resides, but I hold that when he describes himself as of the town of Minnedosa, it is quite sufficient.” *Irwin v. Beynon*, *supra*, per Dubuc, J.

“It is also argued that the statement of claim does not sufficiently state who is the reputed owner, and also the person for whom the work was done. The statement of claim registered states that the plaintiff claims a lien upon the estate of G. W. Beynon, barrister-at-law. I think this is sufficient and it is also in accordance with the form given in the Ontario Statute.” *Irwin v. Beynon*, *supra*, per Dubuc, J.

In *Flack v. Jeffrey*, (1895) 10 Man. 514, the lien as filed stated that the work was commenced on a specified day and that it was finished “on or before” a certain other day. Held, following *Truax v. Dixon*, 17 O.R. 356, and in view of the Manitoba Interpretation Act, that the statement was sufficient. See *Kelly v. McKenzie*, (1884) 1 Man. 169.

**16. What may be included in claim.**—A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but where more than one lien is included in one claim each lien shall be verified by affidavits as provided in the last preceding section. 61 V. c. 29, s. 16.

See Ont. Act, sec. 18, to the same effect. See also *Fairclough v. Smith*, (1901) 13 Man. 509, cited with the cases under section 4 of the Ontario Act.

**17. Claims not to be invalidated for informality.**—A substantial compliance only with the two last preceding sections shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites of the two last preceding sections, unless in the opinion of the court, judge or local judge, who has power to try an action under this Act, the owner, contractor or sub-contractor, mortgagee or other person, as the case

may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced;

(a) **Liens must be registered.**—Nothing in this section contained shall be construed as dispensing with registration of the lien required by this Act. 61 V. c. 29, s. 17.

See Ont. Act, sec. 19, to the same effect.

In *Robock v. Peters*, (1900) 13 Man. 124, the facts in which are stated under sec. 20, *post*, it was held that although "S.'s" claim was from 1st August to 27th October, he might claim for work done prior to 1st August unless some one were prejudiced and that the onus was on the person to show his being prejudiced.

**18. Lien to be registered as an incumbrance.**—The registrar, upon payment of his fee, shall register the claim, so that the same may appear as an incumbrance against the land therein described;

(a) **Fee for registration.**—The fee for registration of a claim of lien for wages shall be twenty-five cents. 61 V. c. 29, s. 18.

See Ont. Act, sec. 20, to the same effect.

**19. Person registering a purchaser pro tanto.**—Where a claim for lien is so registered, the person entitled to said lien shall be deemed a purchaser *pro tanto*, and within the provisions of "The Registry Act"; but, except as herein otherwise provided, "The Registry Act" shall not apply to any lien arising under this Act. 61 V. c. 29, s. 19.

See Ont. Act, sec. 21, to the same effect.

**20. Claims for liens, when to be registered.**—A claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or within thirty days after the completion thereof;

(a) A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days

after the furnishing or placing of the last material so furnished or placed;

(b) A claim for lien for services may be registered at any time during the performance of the service or within thirty days after the completion of the service;

(c) A claim for lien for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work for which the lien is claimed. 61 V. c. 29, s. 20.

See Ont. Act, sec. 22, to the same effect.

"Completion" means "substantial completion." See *Kelly v. McKenzie*, (1884) 1 Man. 169; *McLennan v. Winnipeg*, (1882) 3 Man. 474; *Irwin v. Beynon*, (1866) 4 Man. 10. See also notes under sec. 22, Ont. Act.

In *Chadwick v. Hunter*, (1884) 1 Man. 39, it was decided that where materials are supplied as required from time to time during the progress of the work, not under a contract covering the whole supply, each sale is a separate transaction and requires separate registration. But see *Robock v. Peters*, (1900) 13 Man. 124, in which this case is distinguished, and *Morris v. Tharle*, (1893) 24 O.R. 159, followed, and *Kelly v. McKenzie*, *supra*, held not applicable. In *Robock v. Peters*, *supra*, the facts were as follows: In 1899 defendant bought land and paid part of purchase money. There was no conveyance. He made a contract with plaintiff to build a hotel and stable. Work began in July and finished on 5th of September. The lien was registered on the 22nd of September, and a certificate of *lis pendens* on the 2nd of November. There was no defence. Appointment and trial duly fixed. "S." consented to supply materials on credit and did so from time to time as they were ordered, between 16th of June and 27th of October. Defendant occupied the hotel from July and the work went on until after the 27th of October. "S." registered lien on the 25th of November and certificate of his *lis pendens* on the 20th of January, 1900. Defendant obtained loan of \$300 on the 5th of August, 1899, and took mortgage for \$435. A deed to defendant was executed on the 18th of October when remaining \$135 was advanced by "B." "B.'s" mortgage was registered on the

7th of November, 1899. Defendant mortgaged to loan company on the 3rd of October for \$900. Registration of mortgage 20th of October, 1899. There was due on that mortgage only \$22.75, for solicitor's fees. Defendant mortgaged to S. & D. to secure claims, dated 17th November, incumbrance registered 18th November, 1899. Defendant conveyed to "W." on 30th January, 1900, registered 1st February, 1900. All these parties were brought in by notice of trial and appeared by counsel.

Held, under secs. 20 (2), 21, 28, 31, 32, 27 (1) and (2), that "S.'s" claim could be realized in this action, although he was not a party to it, and there was no binding contract to deliver the materials, the several orders being so linked together as to constitute one cause of action. The time ran from the supply of the last materials.

Also, that incumbrancers other than lien-holders might be dealt with in this action. *Bank of Montreal v. Haffner*, (1884) 10 A.R. 592, and *McVean v. Tiffin*, (1885) 13 A.R. 1, modified by under section 23 of Ontario Act, at p. 143.

#### DETERMINATION OF LIEN.

**21. Liens to cease if action not commenced within time fixed by Act.**—Every lien which is not duly registered under the provisions of this Act shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime an action is commenced to realize the claim, or in which the claim may be realized under provisions of this Act, and a certificate of *lis pendens* in respect thereof be registered in the proper registry office, or land titles office. 61 V. c. 29, s. 21.

See Ont. Act, sec. 23, to the same effect.

See *Davidson v. Campbell*, (1888) 5 Man. 250, referred to under section 23 of Ontario Act, at p. 143.

Under a former Act the lien had no existence until registered (*Kievell v. Murray*, (1884) 2 Man. 209), but this section makes registration before action unnecessary if the certificate is duly registered within the time limited.



**22. When lien to cease if registered and not proceeded upon.**—Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime an action be commenced to realize the claim under the provisions of this Act or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* in respect thereof according to Form No. 6 in the schedule hereto be registered in the proper registry office, or land titles office. 61 V. c. 29, s. 22.

See Ont. Act., sec. 24 (1), to the same effect. The Manitoba Act has no section corresponding with sec. 24 of the Ont. Act.

#### TRANSMISSION OF LIEN.

**23. Death of lien-holder.**—In the event of the death of a lien-holder his right of lien shall pass to his personal representatives; and the right of a lien-holder may be assigned by any instrument in writing. 61 V. c. 29, s. 23.

See Ont. Act., sec. 26, to the same effect.

#### DISCHARGE OF LIEN.

**24. Discharge of lien.**—A lien may be discharged by a receipt signed by the claimant or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and registered; the fees shall be the same as for registering a claim of lien;

(a) **Security or payment into court and vacating lien thereon.**—Upon application the court, judge or local judge, having power to try an action to realize a lien, may receive security or payment into court in lieu of the amount of the claim, and may thereupon vacate the registration of the lien;

(b) **Vacating registration on other grounds.**—The court or such judge or local judge may vacate the said registration upon any other ground;

(c) **Certain acts not to prejudice right to enforce lien.**—The taking of any security for, or the acceptance of any promissory note for, or the taking of any other acknowledgement of, the claim, or the giving of time for the payment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this Act, unless the lien-holder agrees in writing that it shall have that effect;

Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit of this sub-section shall commence an action to enforce such lien within the time limited by this Act, and register a certificate as required by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time;

Provided, further, that, notwithstanding such extension of time, such person may, where an action is commenced by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such action, as if no such extension had been given. 61 V. c. 29, s. 24.

See Ont. Act, sec. 27 (1), (2) and (3), to like effect.

Sub-section 4 of this section is similar to sec. 28 of the Ontario Act.

The above section qualifies sec. 4, *ante*. See note to sec. 4.

#### DISCOVERY.

**25. Lien-holders to be entitled to information from owners as to terms of contract.**—Any lien-holder or person entitled to a lien may at any time demand of the owner or his agent the terms of the contract or agreement with the contractor for and in respect of which the work, service or materials is or are performed

or furnished or placed, and if such owner or his said agent shall not, at the time of such demand or within a reasonable time thereafter, inform the person making such demand of the terms of such contract or agreement and the amount due and unpaid upon such contract or agreement, or shall intentionally or knowingly falsely state the terms of said contract or agreement or the amount due or unpaid thereon, and if the person claiming the lien shall sustain loss by reason of such refusal or neglect or false statement, said owner shall be liable to him in an action therefor to the amount of such loss. 61 V. c. 29, s. 25.

See Ont. Act, sec. 29, to the same effect.

• **26. Order for inspection of contract by lien-holder.**—The court, judge or local judge, having power to try an action to realize a lien, may, on a summary application at any time before or after any action is commenced for the enforcement of such lien, make an order for the owner or his agent to produce and allow any lien-holder to inspect any such contract, and may make such an order as to the costs of such application and order as may be just. 61 V. c. 29, s. 26.

See Ont. Act, sec. 30, to the same effect.

#### ENFORCEMENT OF LIEN.

**27. Mode of realizing liens.**—The liens created by this Act may be realized by actions in the Court of King's Bench, according to the ordinary procedure of that court, excepting where the same is varied by this Act;

(a) It shall not be necessary to make any lien-holders parties defendant to the action; but all lien-holders served with the notice of trial shall for all purposes be treated as if they were parties to the action. 61 V. c. 29, s. 27.

See Ont. Act, sec. 31 (1), (4), to the same effect.

See *Robock v. Peters*, (1900) 13 Man. 124, where parties were brought in by notice of trial. Under a former Act, where any

material amendment to a bill was made, the amended bill had to be registered as a *lis pendens* within the time prescribed for registration, or the lien would cease. Thus in *Davidson v. Campbell*, (1888), 5 Man. 250, the bill alleged a contract with defendant "C." for the performance of certain work in the erection of a building upon land of "C." By amendment made after the time for filing the bill had elapsed the plaintiffs alleged that their contract was with the defendants "K. and McD.," who had contracted with "C." for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new certificate of *lis pendens* was filed. Held, that the plaintiff could not rely upon the original bill and certificate of *lis pendens*. But an immaterial amendment did not necessitate re-registration. *Irwin v. Beynon*, (1886) 4 Man. 10.

**28. Lien-holders joining in action.**—Any number of lien-holders, claiming liens on the same property, may join in the action; and any action brought by a lien-holder shall be taken to be brought on behalf of all other lien-holders on the property in question. 61 V. c. 29, s. 28.

See Ont. Act, sec. 32, to the same effect.

**29. Who may try action for lien.**—An action to enforce a lien may be tried by a judge of the Court of King's Bench at any regular sittings thereof for the trial of actions, or when the aggregate amount of the liens involved does not exceed the sum of one thousand dollars by a local judge of the said court within whose judicial district the cause of action has arisen. 61 V. c. 29, s. 29.

See Ont. Act, secs. 33, 34.

**30. Powers of local judge trying action for lien.**—A local judge of said court trying such action shall have the powers of a local master under "The King's Bench Act," and all the powers and authority conferred by this Act and otherwise upon a judge of the Court of King's Bench to try, determine and finally dispose of such action;



(a) Should it appear to such local judge, at any time during the process of such action, that the aggregate amount involved exceeds one thousand dollars, he shall not be thereby divested of his jurisdiction, but may with the consent of the parties proceed to try, determine and dispose of the same as aforesaid, or, in his discretion, and in any event may refer the action to a judge of the Court of King's Bench at Winnipeg to be there tried and determined, and make all orders for the transmission of papers to the proper officers of the court at Winnipeg and otherwise necessary for the proper trial and determination of the action. 61 V. c. 29, s. 30.

There is no corresponding section in the Ontario Act.

**31. Appointing day for trial.**—After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases where it is desired to try the action otherwise than at the ordinary sittings of the Court of King's Bench, either party may apply to a judge or local judge who has the power to try the action to fix a day for the trial thereof, and the said judge or local judge shall give an appointment fixing the day and place of trial, and on the day fixed, or on such other day to which the trial may be adjourned, shall proceed to try the action, and all questions which arise therein or which are necessary to be tried, to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all inquiries and give all directions, and do all things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action or who have been served with the notice of trial, and shall embody all the results in the judgment;

(a) **Direction as to time for sale.**—The judge or local judge who tries the action may order that the estate or interest charged with the lien may be sold, and when, by the judgment, a sale is directed of the estate or interest charged with the lien, the judge or local judge who tries the action may direct the sale to take place at any time after judgment, allowing, however, a reasonable time for advertising such sale;

(b) **Directing sale of materials.**—The judge or local judge who tries the action may also direct the sale of any materials and authorize the removal thereof;

(c) **Letting in lien-holders who have not proved their claims at trial.**—Any lien-holder, who has not proved his claim at the trial of any action to enforce a lien, on application to the judge or local judge who tried the action and on such terms as to costs and otherwise as may be just, may be let in to prove his claim at any time before the amount realized in the action for the satisfaction of liens has been distributed; and where such claim is proved and allowed, the judge or local judge shall amend the judgment so as to include such claim therein;

(d) **Report where sale is had.**—When a sale is had the judge or local judge with whose approbation the lands are sold shall make a report on sale and therein direct to whom the moneys in court shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in connection therewith; and where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the amount of the deficiency and the names of the persons, with their amounts, who are entitled to recover the same, and the persons by the judgment adjudged to pay the same, and such former persons shall be entitled to enforce the same by execution or otherwise as on a judgment of the court.

(e) **Attendance in person at trial by certain lien-holders.**—Any lien-holder for an amount not exceeding one hundred dollars, or any lien-holder not a party to the action, may attend in

person at the trial of an action to enforce a lien, and on any proceedings in such action, or may be represented thereat or thereon by a solicitor or by an agent who is not a solicitor. 61 V. c. 29, s. 31.

See Ont. Act, sec. 35, to the same effect.

**32. Notice of trial service of.**—The party obtaining an appointment fixing the day and place of trial shall, at least eight clear days before the day fixed for the trial, serve a notice of trial, which may be according to Form No. 10 in Schedule A to this Act, upon the solicitors for the defendants who appear by solicitors, and on all lien-holders known to him, who have registered their liens as required by this Act, and on all other persons having any registered charges, incumbrance or claims on the said lands, who are not parties or who, being parties, appear personally in the said action; and such service shall be personal, unless otherwise directed by the judge or local judge who is to try the case, who may, in lieu of personal service, direct in what manner the notice of trial may be served. 61 V. c. 29, s. 32.

See Ont. Act, sec. 36, to the same effect.

**33. Consolidation of actions.**—Where no more than one action is brought to realize liens in respect of the same property, a judge or local judge, having power to try such actions, may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate all such actions into one action, and may give the conduct of the consolidated action to any plaintiff in his discretion. 61 V. c. 29, s. 33.

See Ont. Act, sec. 37, to the same effect.

**34. Transferring carriage of proceedings.**—Any lien-holder entitled to the benefit of the action may apply for the carriage of the proceedings, and the judge or local judge, having power to try the action, may thereupon make an order giving such lien-holder the carriage of the proceedings, and such lien-holder shall

for all purposes thereafter be the plaintiff in the action. 61 V. c. 29, s. 34.

See Ont. Act, sec. 38, to the same effect.

**35. When judgment of court in first instance to be final.—**

In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is one hundred dollars or less, the said judgments shall be final, binding and without appeal, except that upon application, within fourteen days after judgment is pronounced, to the judge or local judge who tried the same, he may grant a new trial. 61 V. c. 29, s. 35.

See Ont. Act, sec. 39, to the same effect.

**36. When appeal lies.—**

In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than one hundred dollars, any party affected thereby may appeal therefrom to the Court of King's Bench *in banc*, whose judgment shall be final and binding, and no appeal shall lie therefrom. The procedure upon appeal from the judgment of a local judge shall be the same as upon appeal from a judgment of a judge. 61 V. c. 29, s. 36.

See Ont. Act, sec. 39 (2).

**37. Limit of costs to plaintiff.—**

The costs of the action awarded in any action under this Act, by the judge or local judge trying the action, to the plaintiffs and successful lienholders, shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge or local judge who tries the action may direct. 61 V. c. 29, s. 37.

See Ont. Act, sec. 41, to the same effect



**38. Limit of costs to be awarded against plaintiffs.**—Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge or local judge may direct. 61 V. c. 29, s. 38.

See Ont. Act, sec. 42, to the same effect.

**39. Costs where least expensive course not taken.**—In case the least expensive course is not taken by a plaintiff under this Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken. 61 V. c. 29, s. 39.

See Ont. Act, sec. 43, to the same effect.

**40. Costs.**—The costs of and incidental to all applications and orders made under this Act, and not otherwise provided for, shall be in the discretion of the judge or local judge to or by whom the application or orders is made;

(a) Where a lien is discharged or vacated under the twenty-fourth section of this Act, or when in an action judgment is given in favor of or against a claim for a lien, in addition to the costs of an action the judge or local judge may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration thereof. 61 V. c. 29, s. 40.

See Ont. Act, secs. 44 and 45.

**41. Payments out of court.**—In actions tried by a local judge, the local judge who tries the action shall, where money has been paid into court and the time for payment out arrives, forward a requisition for cheques with a certified copy of his judgment, and (when one is made) of the report on sale, to the accountant of the Court of King's Bench, who shall, upon receiving the said requisition and copy of the judgment and report (if any) make

out and return to the said local judge cheques for the amounts payable to the persons specified in the requisition, and the said local judge on receipt of said cheques shall distribute them to the persons entitled. 61 V. c. 29, s. 41.

See Ont. Act, sec. 46 (1), to the same effect.

**42. Fees not to be payable on payments out of court.**—No fees shall be payable or any cheques or proceedings to pay money into court or obtain money out of court in respect of a claim of lien, but sufficient postage stamps to prepay a return registered letter shall be enclosed with every requisition for cheques. 61 V. c. 29, s. 42, part.

See Ont. Act, sec. 46 (2), to the same effect.

**43. Form of judgment in favor of lien-holders.**—All judgments in favor of lien-holders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after the sale of the property adjudged to be sold; and whenever on a sale of any property to realize a lien under this Act, sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered against the property of such person or persons by the usual process of the court. 61 V. c. 29, s. 43.

See Ont. Act, sec. 47, to the same effect.

**44. Personal judgment when claim for lien fails by the usual process.**—Whenever in an action brought under the provisions of this Act any claimant shall fail for any reason to establish a valid lien, he may, nevertheless, recover therein a personal judgment against the party or parties to the action for such sum or sums as may appear to be due to him from him or them and which he might recover in an action in contract against such party or parties. 61 V. c. 29, s. 44.

See Ont. Act, sec. 48, to the same effect.

## FORMS.

**45. Forms.**—The forms in the schedule hereto, or forms similar thereto or to the like effect, may be adopted in all proceedings under this Act. 61 V. c. 29, s. 45.

See Ont. Act, sec. 49, to the same effect. See also cases cited as to forms, at p. 168.

## SCHEDULE.

The following is the schedule referred to in this Act,—

## SCHEDULE A.

## FORM No. 1—(SECTION 15).

## CLAIM OF LIEN.

**Claim of lien.**—A.B. (name of claimant, of (here state residence of claimant), (if so, as assignee of, stating name and residence of assignor), under “The Mechanics’ and Wage-Earners’ Lien Act,” claims a lien upon the estate of (here state the name and residence of owner of the land upon which the lien is claimed) in the undermentioned land in respect of the following work (service or materials), that is to say (here give a short description of the nature of the work done or materials furnished, and for which the lien is claimed), which work (or service) was (or is to be) done (or materials were furnished) for (here state the name and residence of the person upon whose credit the work is done or materials furnished), on or before the                      day of                      , 19                      .

The amount claimed as due (or to become due) is the sum of \$                      . The following is a description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

When credit has been given, insert: The said work was done (or materials were furnished) on credit, and the period of credit agreed to expired (or will expire) on the                      day of                      , 19                      .

Dated at                      , this                      day of                      , A.D., 19                      .  
(Signature of claimant.)

61 V. c. 29, Sch. Form 1.

## FORM No. 2—(SECTION 15).

## CLAIM OF LIEN FOR WAGES.

**Claim of lien for wages.**—A. B. (name of claimant), of (here state residence of claimant), (if so, as assignee of, stating name and residence of assignor), under “The Mechanics’ and Wage-Earners’ Lien Act,” claims a lien upon the estate of (here state the name and residence of the owner of land upon which the lien is claimed) in the undermentioned land, in respect of        days’ work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done) on or before the        day of        , 19        .

The amount claimed as due is the sum of \$        .

The following is the description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at        , this        day of        , A.D. 19        .

(Signature of claimant.)

61 V. c. 29, Sch. Form 2.

## FORM No. 3—(SECTION 15).

## CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

**Claim of lien by several wage-earners.**—The following persons, under “The Mechanics’ and Wage-Earners’ Lien Act,” claim a lien upon the estate of (here state the name and residence of the owner of land upon which the lien is claimed) in the undermentioned land in respect of wages for labor performed thereon while in the employment of (here state name and residence or names and residences of employers of the several persons claiming the liens).

A. B., of (residence) \$        for        days’ wages.

C. D., of (residence) \$        for        days’ wages.

E. F., of (residence) \$        for        days’ wages.

The following is the description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at        , this        day of        , A.D. 19        .

(Signature of the several claimants.)

61 V. c. 29, Sch. Form 3.



## FORM NO. 4—(SECTION 15).

## AFFIDAVIT VERIFYING CLAIM.

**Affidavit verifying claim.**—I, A. B., named in the above (or annexed) claim, do make oath that the said claim is true.

Or, we, A. B. and C. D., named in the above (or annexed) claim, do make oath, and each for himself saith that the said claim, so far as relates to him, is true.

(Where affidavit is made by agent or assignee, a clause must be added to the following effect: I have full knowledge of the facts set forth in the above (or annexed) claim.)

SWORN to before me at \_\_\_\_\_,  
in \_\_\_\_\_ of \_\_\_\_\_, this  
day of \_\_\_\_\_, A.D. 19 \_\_\_\_.

OR, the said A. B. and C. D.  
were severally sworn before  
me at \_\_\_\_\_ in the \_\_\_\_\_,  
of \_\_\_\_\_, this \_\_\_\_\_ day of  
\_\_\_\_\_, A.D. 19 \_\_\_\_.

OR, the said A. B. was sworn be-  
fore me at \_\_\_\_\_ in the \_\_\_\_\_ of  
\_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_,  
A.D. 19 \_\_\_\_.

61 V. c. 29, Sch. Form 4.

## FORM NO. 5—(SECTION 45).

## AFFIDAVIT VERIFYING CLAIM IN COMMENCING AN ACTION.

(Style of Court and Cause.)

**Affidavit verifying claim in commencing an action.**—I,  
\_\_\_\_\_, make oath and say that I have read (or heard read) the foregoing claim of lien, and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all the sums of money or goods or merchandise to which (naming the debtor) is entitled to credit as against me.

Sworn, etc.

61 V. c. 29, Sch. Form 5.

## FORM No. 6—(SECTIONS 21 AND 22).

## CERTIFICATE OF LIS PENDENS.

(Style of Court and Cause.)

**Lis pendens.**—I certify that the above plaintiff has commenced an action in the above court to enforce against the following land (describing it) a claim to a mechanics' lien for \$ .

Dated at , this day of , A.D. 19 .

(Seal.)

Prothonotary.

61 V. c. 29, Sch. Form 6.

## FORM No. 7—(SECTION 45).

## STATEMENT OF DEFENCE.

(Style of Court and Cause.)

**Statement of defence.**—A. B., , disputes that the plaintiff is now entitled to a mechanics' lien on the following grounds (setting forth the grounds shortly):—

(a) That the lien has not been prosecuted in due time, as required by statute.

(b) That there is nothing due to the plaintiff.

(c) That the plaintiff's lien has been vacated and discharged.

(d) That there is nothing due by (the owner) for the satisfaction of the plaintiff's claim.

Delivered on the day of , by A. B. in person, whose address for service is (stating address within two miles of the court house), or

Or, delivered on the day of , by Y. Z., solicitors for the said A. B.

**NOTE.**—If the owner does not dispute the lien entirely, and only wishes to have the accounts taken, he must use the following form:—

61 V. c. 29, Sch. Form 7.

## FORM NO. 8—(SECTION 45).

STATEMENT OF DEFENCE WHERE THERE ARE NO MATTERS DIS-  
PUTED OR WHERE THE MATTERS IN DISPUTE ARE  
MATTERS OF ACCOUNT.

(Style of Court and Cause.)

**Further statement of defence.**—A. B. admits that the plaintiff is entitled to a lien and claims that the following is a just and true statement of the account in question:—

Amount of contract price for work contracted to be performed by E. F., as plumber, on the lands in question herein.....	\$500.00
Amounts paid on account:—	
June 1st, 1898, paid E. F.....	\$200.00
July 1st, 1898, paid G. H. and I. K., sub-contractors of E. F.....	100.00
	————— \$300.00

Balance admitted to be due.....\$200.00

For satisfaction of lien of plaintiff and other lien-holders (as the case may be) A. B. before action tendered to the plaintiff \$ in payment of his claim, and now brings into court \$ and submits that that amount is sufficient to pay the plaintiff's claim, and asks that this action be dismissed as against him with costs.

Delivered, etc.

61 V. c. 29, Sch. Form 8.

## FORM NO. 9—(SECTION 45).

## AFFIDAVIT OF OWNER VERIFYING ACCOUNT.

(Style of Court and Cause.)

**Owner's affidavit verifying account.**—I, A. B., of , being the owner of the lands in question in this action, make oath and say: That the account set forth in the foregoing defence is a just and true account of the amount of the contract price agreed

to be paid by me to E. F. for the work contracted to be done by him on the lands in question.

The said account also justly and truly sets forth the payments made by me on account thereof, and the person or persons to whom the same were made; and the balance of \$200 appearing by such account to be still due and payable is the just and true sum now due and owing by me in respect of my contract with the said E. F.

Sworn, etc.

61 V. c. 29, Sch. Form 9.

### FORM NO. 10—(SECTION 32).

#### NOTICE OF TRIAL.

(Style of Court and Cause.)

**Notice of trial.**—Take notice that this action will be tried at the court house in the                      of                      , on the                      day of                      of                      , by one of the judges of the Court of King's Bench (or by the local judge of the Court of King's Bench for the                      Judicial District), and at such time and place the said judge (or local judge) will proceed to try the action and all questions which arise in or which are necessary to be tried to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all inquiries and give all directions and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions and accounts arising in said action, and will give all necessary relief to all parties.

And further, take notice that, if you do not appear at the trial and prove your claim (if any) or prove your defence (if any) to the action, the proceedings will be taken in your absence and you may be deprived of all benefit of the proceedings and your rights disposed of in your absence.

This is a mechanics' lien action brought by the above named plaintiff against the above named defendants to enforce a mechanics' lien against the following lands: (set out description of lands).

This notice is served by, etc.

61 V. c. 29, Sch. Form 10.



## FORM No. 11—(SECTION 45).

STATEMENT OF ACCOUNT BY LIEN-HOLDERS, NOT PARTIES  
TO THE ACTION.

(Style of Court and Cause.)

## Lien-holder's account.—

E. F. Dr. to G. H.

1898.

Jan. 1.	To 12 dozen brackets.....	\$12.00
Feb. 3.	To 50 lbs. nails.....	5.00
Oct. 3.	To 40 sheets of glass.....	40.00
		<hr/>
		\$57.00

Cr.

1898.

Feb. 4.	By cash .....	\$ 4.00
June 5.	By goods .....	20.00
		<hr/>
		\$24.00
		<hr/>
		\$24.00
		<hr/>
		\$33.00

61 V. c. 29, Sch. Form 1.

## FORM No. 12—(SECTION 45).

## AFFIDAVIT OF LIEN-HOLDER VERIFYING CLAIM.

(Style of Court and Cause.)

**Lien-holder's affidavit of claim.**—I, G. H., of (address and occupation), make oath and say:

I have in the foregoing account (or in the account now shown to me, marked A) set forth a just and true account of the amount due and owing to me by E. H. (or by E. F., who is a contractor with the defendant, L. G.), the owner of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise to which the said E. F. (or E. H.) is justly entitled to credit in respect of the said account,

and the sum of \$33 appearing by such account to be due to me as the amount (or balance) of such account is now justly due and owing to me.

Sworn, etc.

61 V. c. 29, Sch. Form 12.

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FORM NO. 13—(SECTION 31).

JUDGMENT.

**Judgment.**—In the Court of King's Bench.

day, the , 19 .

(Name of judge or local judge.)

Between

A. B., plaintiff,

and

C. D., defendant.

This action coming on for trial before in at , upon opening of the matter and it appearing that the following persons have been duly served with notice of trial herein (set out names of all persons served with notice of trial) and all such persons (or as the case may be) appearing at the trial (if so, and the following persons not having appeared, setting out the names of non-appearing persons), and upon hearing the evidence adduced and what was alleged by counsel for the plaintiff and for C. D. and E. F. and the defendant (if so, and by A. B. appearing in person).

1. This court doth declare that the plaintiff and the several persons mentioned in the first schedule hereto are respectively entitled to a lien, under "The Mechanics' and Wage-Earners' Lien Act," upon the lands described in the second schedule hereto, for the amounts set opposite their respective names in the first, second and third columns of the said first schedule, and the persons primarily liable for the said claims respectively are set forth in the fourth column of said schedule.

2. (If so) And this court doth further declare that the several persons mentioned in the third schedule hereto are also entitled to some lien, charge or incumbrance upon the said lands for the amount set opposite their respective names in the fourth column of the said third schedule.

3. And this court doth further order and adjudge that upon the defendant (A. B., the owner) paying into the court to the credit of this action the sum of                    (gross amount of liens in Schedules 1 and 3 for which owner is liable), on or before the day of                    next, that the said liens in the first schedule mentioned be and the same are hereby discharged, and the several persons in the said third schedule are to release and discharge their said claims and assign and convey the said premises to the defendant (owner) and deliver up all documents on oath to the said defendant (owner) or to whom he may appoint, and the said moneys so paid into court are to be paid out in payment of the claims of the said lien-holders (if so, and incumbrancers).

4. But in case the said defendant (owner) shall make default in payment of the said moneys into court as aforesaid, this court doth order and adjudge that the said lands be sold with the approbation of a judge of this court (or if action has been tried by a local judge, by the local judge of this court for the Judicial District), and that the purchase money be paid into court to the credit of this action, and that all proper parties do join in the conveyances as the said judge (or local judge) shall direct.

5. And this court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in the said first (and third) schedule mentioned as the said judge (or local judge) shall direct, with subsequent interest and subsequent costs to be computed and taxed by the said judge (or local judge).

6. And this court doth further order and adjudge that in case the said purchase money shall be insufficient to pay in full the claims of the several persons mentioned in the said first schedule, the persons primarily liable for such claims as shown in the said first schedule do pay to the persons to whom they are respectively primarily liable the amount remaining due to such persons forthwith after the same shall have been ascertained by the said judge (or local judge).

7. (If so, And this court doth declare that                    have not proved any lien under "The Mechanics' and Wage-Earners' Lien Act," and that they are not entitled to any such lien, and this court doth order and adjudge that the claims of lien respectively registered by them against the lands mentioned in the said second schedule be and the same are hereby discharged.)

## FORM No. 14—(SECTION 24).

## CERTIFICATE VACATING LIEN.

(Style of Court and Cause.)

Date

**Certificate of prothonotary.**—I certify that the defendant A. B. (the owner) has paid into court to the credit of this cause all money due and payable by him for the satisfaction of the liens of the plaintiff and E. F., G. H., I. J., and K. L., and their liens are hereby vacated and discharged so far as the same affect the following lands (describe lands).

(Signature of prothonotary.)

61 V. ch. 29, Sch. Form 14.

## FORM No. 15—(SECTION 45).

## CERTIFICATE VACATING LIEN.

(Style of Court and Cause.)

Date

**Certificate of judge.**—I certify that I have inquired and find that the plaintiff is not entitled to any mechanics' lien upon the lands of the defendant A. B. (the owner) and that his claim of lien is hereby vacated and discharged so far as the same affects the following lands (describe lands).

(Signature of judge or local judge.)

61 V. c. 29, Sch. Form 15.

## FIRST SCHEDULE.

Names of lien-holders entitled to mechanics' liens.	Amount of debt and interest. (if any).	Costs.	Total.	Names of primary debtors.

(Signature of officer issuing judgment).



## SECOND SCHEDULE.

The lands in question in this matter are (set out description sufficient for registration purpose).

(Signature of officer issuing judgment).

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## THIRD SCHEDULE.

Names of persons entitled to incumbrances other than mechanics' liens.	Amount of debt and interest. (if any).	Costs.	Total.

(Signature of officer issuing judgment.)

61 V. c. 29, Sch. Form 13.

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## REVISED STATUTES OF BRITISH COLUMBIA (1897).

## CHAPTER 132.

## AN ACT FOR THE BENEFIT OF MECHANICS AND LABORERS.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

## SHORT TITLE.

1. **Short title.**—This Act may be cited as the “Mechanics’ Lien Act,” 1891, c. 23, s. 1.

## INTERPRETATION.

2. **Interpretation.**—In the construction of this Act:—

(1) **“Contractor.”**—“Contractor” shall mean a person employed directly by the owner for the doing of work for any of the purposes mentioned in this Act:

(2) **“Sub-contractor.”**—“Sub-contractor” shall mean a person not contracting with or employed directly by the owner for the purpose aforesaid, but contracting with or employed by the contractor or under him by another sub-contractor, to do the whole or a certain portion of the work, but a person doing manual or mental labor for wages shall not be deemed a sub-contractor.

(3) **“Owner.”**—“Owner” shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done, and all persons claiming under him whose rights are acquired after the work in respect to which the lien is claimed is commenced:

(4) **“Works or improvements.”**—“Works or Improvements” shall include every act or undertaking for which a lien may be claimed under this Act:

(5) **“Laborer.”**—“Laborer” shall mean, extend to, and include every mechanic, artisan, builder, or other person doing labor for wages. 1891, c. 23, s. 2.

See definition of “material” added by chapter 20 of the Statutes of 1900.

See Ont. Act, sec. 2. The latter part of sub-sec. (2) is not in the Ontario Act, and in defining “owner” the Ontario Act expressly includes firms, associations, municipal corporations and railway companies.

See chapter 20 of the B. C. Statutes of 1900 for important amendments to secs. 1, 2, 3, and 5, by which amendments “materials” are made subject to lien and “miner” is included in definition of “laborer.”

As to “owner” see decision in *Anderson v. Godsall*, 7 B.C.R. 404, referred to under sec. 4, *post*.

The Ontario Act, sec. 2, includes a definition of “wages,” which is found in an amendment to this Act (ch. 20, sec. 17, 1900).

“L.” bought property from “T.” for \$1,200, paid \$50 down, balance to be payable immediately, and took possession and erected buildings, etc. Plaintiff supplied lumber for these and claimed lien against “L.” and “T.”

Held, following *Anderson v. Godsall*, 7 B.C.R. 404, that the lien only extended to the equitable interest of “L.” and that claim against “T.” should be dismissed. *B. C. Timber and Trading Co. v. Lebery*, (1902) 22 C.L.T. 273.

#### APPLICATION.

**3. Application.**—This Act shall apply to any contract made or work begun previous to the passage hereof, but only so far as regards any moneys remaining unpaid and as respects any such unpaid moneys. 1891, c. 23, s. 3.

## NATURE OF LIENS.

**4. Mechanics and others to have liens for work done, etc.—**

Unless there is an agreement in writing to the contrary, signed by the person claiming the lien, every contractor, sub-contractor, and laborer doing or causing work to be done upon the construction, erection, alteration, or repair, either in whole or in part, of, or addition to, any building, erection, wharf, bridge, or other work, or doing or causing work to be done upon or in connection with the clearing, excavating, filling, grading, draining, or irrigating any land in respect of a railway, mine, sewer, drain, ditch, flume or other work, or improving any street, road, or sidewalk adjacent thereto, at the request of the owner of such land, shall, by virtue of such work, have a lien or charge, for the price of such work, upon such building, erection, wharf, machinery, fixtures, or other works, and all materials furnished or procured for use in constructing or making such works or improvements, so long as the same are about to be in good faith worked into or made part of the said works or improvements, and the land and premises occupied thereby, or enjoyed therewith, but limited in amount as hereinafter mentioned: Provided such lien shall affect only such interest in the said land as is vested in the owner at the time the contract is made, or any greater interest which the owner may acquire during the progress of the works or improvements. 1891, c. 23, s. 4.

See section substituted for this section by chapter 20 of the Statutes of 1900.

By the provisions of that chapter material men are given a lien.

See Ont. Act, secs. 4 and 7.

This section only applies where the work, etc., is done at the request, express or implied, of the "owner." Section 7 does not apply to any case already provided for by sec. 4, but only applies where the actual owner had not authorized the buildings or improvements, which were authorized by the supposed owner, the actual owner standing by and allowing the work to be done in



order to take advantage of it. The governing clause in sec. 4 is "at the request of the owner." "C.," the holder of a working option comes within the definition of "owner," as he had an equitable estate. Irving, J., dissenting, held that sec. 7 incorporated the words of sec. 4 as to "other improvements," and therefore included "excavating land in respect to a mine" and was therefore applicable in the case of work done on a mining claim which appears, from the agreement, to have been done for the direct benefit of the owner, and subject to the inspection of his engineer. *Anderson v. Godsall*, (1900) 7 B.C.R. 404. There is no similar section in the Ontario Act to which this decision would apply. See also *Fortin v. Pound*, (1905) 1 W.L.R. 333.

The B. C. Mechanics' Lien Act of 1891, by sec. 30, repealed all previous Acts. As it enacted no lien for materials no such lien existed. *Albion I. Works v. A.O.U.W.*, (1895) 5 B.C.R. 122, note.

No lien can be claimed against a railway under the control of the Dominion Government. *Larsen v. Nelson and F. S. Ry.*, (1895) 4 B.C.R. 151. See observations in respect to lien legislation as applied to railways, *ante*, at pp. 85, 99.

An action to enforce a mechanics' lien is not an action for "any kind of debt" but is for penalty or forfeiture. *Dillon v. Sinclair*, (1900) 7 B.C.R. 328.

A lien-holder is entitled in preference to holders of equitable assignments from the contractor. *Johnson v. Braden*, (1887) 1 B.C.R., part 2, p. 265.

Defendant employed contractor under written contract to clear land for cultivation purposes. Laborer who worked for contractor in clearing the land held not entitled to lien. *Black v. Hughes*, (1902) 22 C.L.T. 220.

Mechanics' liens were filed against mining claims and judgment recovered on them in the County Court. On the same day a winding-up order was made in the Supreme Court. Subsequently the liquidator obtained an order to give first lien on property in order to get funds to take out Crown grants. The lien-holders were not notified of this application and did not appear. They did not appeal, but applied for leave to enforce their judgment in priority to charge given by liquidator. Held, that liquidator's order was made without jurisdiction and that lien-holders were not bound by it. *Re Ibez Mining and Development Co.*, (1902) 9 B.C.R. 557.

Plaintiff was employed by Green as a logger. Green had a

contract with defendant company. In an action to enforce mechanics' lien for wages it appeared that prior to this action plaintiff and sixteen others obtained a judgment against Green under the Woodman's Lien Act for gross amount of their wages and had seized the logs and sold. Held, that they could not get another judgment under the Mechanics' Lien Act for the same claim. *Wake v. C.P. Lumber Co.*, (1901) 8 B.C.R. 358.

**5. Amount to which lien is limited.**—Such lien shall be limited in amount to the sum actually owing to the person entitled to the lien, and distribution of any moneys derived from the realization of the liens shall be made in accordance with the twenty-second section of this Act. 1891, c. 23, s. 5.

See Ont. Act, sec. 4. See also *Leroy v. Smith*, (1900) 8 B.C.R. 293; *Weller v. Shupe*, (1897) 6 B.C.R. 58.

**6. Liens on mortgaged premises.**—Where works or improvements are put upon mortgaged premises, the liens by virtue of this Act shall be prior to such mortgage, as against the increase in value of the mortgaged premises by reason of such works or improvements, but not further, unless the same is done at the request of the mortgagee in writing; and the amount of such increase shall be ascertained upon the basis of the selling value upon taking of the account, or by the trial of an issue as provided in the sixteenth section hereof, and thereupon the judge may, if he shall consider the works or improvements of sufficient value to justify the proceedings, order the mortgaged premises to be sold at an upset price equal to the selling value of the premises immediately prior to the commencement of such works or improvements (to be ascertained as aforesaid), and any sum realized in excess of such upset price shall be subject to the liens provided for by this Act. The moneys equal to the upset price as aforesaid shall be applied towards the said mortgage or mortgages, according to their priority. Nothing, however, in this section shall prevent the lien from attaching upon the equity

of redemption or other interest of the owner of the land subject to such mortgage or charge. 1891, c. 23, s. 6.

See amendment to this section by ch. 20 of the Statutes of 1900.

See Ont. Act, s. 7 (3).

In a recent case (*Re Ibex Mining and Development Co.*, (1902) 9 B.C.R. 557) mechanics' liens had been filed against the property of a company and judgment recovered in respect to them in the County Court. On the same day as the judgment a winding-up order was made in the Supreme Court. Subsequently the liquidator obtained an order authorizing him to give a first charge on the property of the company in order to raise money to take out certain Crown grants of property to which the company was entitled. The lien-holders had no notice of the application, and did not appear on the hearing. They did not appeal, but applied for leave to enforce their judgment in priority to the charge created by the liquidator under the order of court. Held, that the order made on the application of the liquidator was made without jurisdiction, and the lien-holders were not bound by it.

**7. Owner of lands deemed to have authorized the erection of buildings thereon.**—Every building or other improvement mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or his authorized agent, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner, or person having or claiming any interest therein, unless such owner or person having or claiming any interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement thereon. 1891, c. 23, s. 7.

See amendment to this section by ch. 20 of the statutes of 1900, sec. 10, which provides that owner shall, on posting notice on land, cease to be liable for work thereafter done.

See Ont. Act, s. 5.

## REGISTRATION AND TRANSMISSION.

8. Lien expires in 31 days after completion of work unless registered.—Mode of registration.—Every lien upon any such building, erection, mine, works or improvements, or land, shall absolutely cease to exist after the expiration of thirty-one days after the work shall have been completed, or after the claimant has ceased to work thereon from any cause (provided, however, that any laborer shall not be held to have ceased work upon any building, erection, mine, works or improvements, until the completion of the same, if he has in the meantime been employed upon any other work by the same contractor), unless in the meantime the person claiming the lien shall file in the office of the Government agent in the city, town or district wherein the land is situate, and in case there shall be no Government agent in such city, town or district, then in the office of the registrar-general of titles, or in the office of the nearest district registrar of titles, an affidavit, sworn before any person authorized to take oaths, stating, in substance:—

(a) The name and residence of the claimant, and of the owner of the property or interest to be charged;

(b) The particulars of the kind of work done;

(c) The time when the work was finished or discontinued;

(d) The sum claimed to be owing, and when due;

(e) The description of the property to be charged;

Which affidavit shall be received and filed as a lien against such property, interest or estate. The registrar-general, district registrar, and every Government agent, shall be supplied with printed forms of such affidavits, in blank, which may be in the form or to the effect of schedule A to this Act, and which shall be supplied to every person requesting the same, and desiring to file a lien. Every Government agent, the registrar-general and district registrars of titles, shall keep an alphabetical index of all claimants of liens and the persons against whom such liens are claimed, which index shall be open for



inspection during office hours, and it shall be the duty of such Government agent, registrar-general of titles or district registrar to decide whether his is or is not the proper office for the filing of such affidavit, and to direct the applicant accordingly; and no affidavit shall be adjudged insufficient on the ground that it was not filed in the proper office. 1891, c. 23, s. 8.

See ch. 20 of the statutes of 1900, secs. 12 and 13.

The statement of claim did not disclose the kind of materials, etc. Held, bad, but as lien is operative when registered and action brought and certificate of *lis pendens* registered plaintiff's lien was not prejudiced. *Johnson v. Braden*, (1887) 1 B.C.R., pt. 2, p. 265. See *Weller v. Shupe*, (1897) 6 B.C.R. 58, cited *ante*, at p. 25, where particulars of claim in affidavit for lien were held insufficiently stated. See also *Knott v. Cline*, (1896) 5 B.C.R. 120, and *Smith v. McIntosh*, (1893) 3 B.C.R. 26.

In a proceeding for the purpose of realizing a mechanics' lien the affidavit was sworn before a person now plaintiff's solicitor. Held, sufficient. *Elliott v. McCallum*, (1899) 19 C.L.T. 412.

See Ont. Act, secs. 17-24. By ch. 20, sec. 13, of the B.C. Statutes of 1900, a substantial compliance with the terms of sec. 12 of that chapter (substituted for the above sec. 8) is sufficient.

See sec. 9, *post*, as to additional provisions in affidavit.

**9. In works of over \$500 contractor must file statement showing work to be done, etc.**—When any works, buildings, or improvements upon any lands, mine or premises are about to be done, erected or made, and the contract price or estimated cost thereof shall exceed five hundred dollars, the owner and contractor (if any) shall file or cause to be filed in the office of the Government agent in the city, town or county wherein the land is situated, and in case there shall be no Government agent in such city; town or county, then in the land registry office of the land registry district within the limits of which such lands, mine, or premises are situate, a statement setting forth the particulars of the works or improvements to be done, erected or

made, the name and address of the owner, the nature of his interest in the land, the name and residence of the contractor (if any), and the estimated cost or contract price of the works or improvements, which statement shall be signed by the said owner and contractor (if any), or by some person duly authorized to sign the same by him or them. Such statement may be in the form of schedule B annexed to this Act. Any affidavit made under section eight of this Act, which shall be in accordance with such statement so filed as above provided, shall be deemed sufficient to sustain any lien, even though the facts of the case should vary therefrom; and where no such certificate is filed no affidavit shall be adjudged to be insufficient, if it describes the owner, contractor (if any), and works or improvements, so as to leave no doubt upon the mind of the court or judge as to who and what are intended to be described. 1891, c. 23, s. 9.

See amendment to this section by ch. 20, statutes of 1900, sec. 14.

The Ontario Act has no corresponding section.

**10. Liens pass on death to legal representatives, or may be assigned.**—In the event of the death of the lien-holder his lien shall pass to his personal representatives, and the right of a lien-holder may be assigned by any instrument in writing, subject to the limitation contained in the twelfth section hereof. 1891, c. 23, s. 10.

See Ont. Act, s. 26.

#### SECURITY.

**11. During continuance of lien property must not be removed.**—During the continuance of any lien no portion of the property affected thereby shall be removed to the prejudice of such lien, and any attempt at such removal may be restrained on application to the judge of the County Court nearest to which the land is situate. 1891, c. 23, s. 11.

See Ont. Act, s. 16.

**12. Receipted pay rolls to be posted on works.**—No contractor, or sub-contractor, shall be entitled to demand or receive any payment in respect of any contract, where the contract price exceeds five hundred dollars, until he, or some person in charge of the works or improvements, shall post upon the works or improvements a copy of the receipted pay-roll, from the hour of 12 m. to the hour of 1 p.m., on the first legal day after pay day, and shall have delivered to the owner, or other person acting on his behalf, the original pay-roll containing the names of all laborers who have done work for him upon such works or improvements, with a receipt in full from each of the said laborers, with the amounts which were due and had been paid to each of them set opposite their respective names, which pay-roll may be in the form of schedule C hereto, and no payment made by the owner without the delivery of such pay-roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate or interest in favor of any such laborer. No assignment by the contractor, or any sub-contractor, of any moneys due in respect to the contract shall be valid as against any lien given by this Act. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, off-set or counter-claim in favor of the owner against the contractor. 1891, c. 23, s. 12.

The Ontario Act has no corresponding section.

#### ENFORCEMENT.

**13. Consolidated liens.**—Any number of lien-holders may be joined in one suit, and all suits or proceedings brought by a lien-holder shall be taken to be brought on behalf of all lien-holders who may be made parties to such suits or proceedings within the time mentioned in the twenty-fourth section hereof: Provided that the moneys realized in such suit shall be distributed amongst the lien-holders, parties to such suit or proceedings, in the order and manner provided in the twenty-second

section of this Act. Any lien-holder not originally joined may be made a party to such suit or proceedings by order of a judge, upon *ex parte* application supported by an affidavit stating the particulars of the claim, and any lien-holder so joined in any such suit or proceedings shall be deemed to have complied with the twenty-fourth section of this Act as fully as if he had instituted a suit in his own behalf. 1891, c. 23, s. 13.

See Ont. Act, secs. 31 and 32.

**14. Owner may apply to have suits consolidated.**—If more than one suit is commenced in respect of the same contract, the owner or contractor shall apply to have the causes consolidated, and failing to do so he shall pay the costs of such additional suit or suits. The owner complying with the provisions of this Act shall not be liable for any greater sum than he has agreed to pay by contract. 1891, c. 23, s. 14.

See Ont. Act, sec. 37.

**15. Judge may order consolidation of actions.**—If two or more actions are brought in respect of the same contract or work, the court or judge shall, by order, on the application of any person interested, consolidate all the actions, and may make such order as to costs as he shall think fit. 1891, c. 23, s. 15.

See Ont. Act, sec. 37.

**16. Suits to be brought in County Court.**—Whatever the amount of lien or liens, proceedings may be taken before a judge of the County Court of the county in which the land charged is situate, who is hereby authorized and empowered to proceed in a summary manner by summons and order, and he may take accounts and make requisite inquiries, try issues, and in default of payment may direct the sale of the estate or interest charged, and such further proceedings may be taken for the purpose aforesaid as the judge may think proper in his discretion, and any conveyance under his seal shall be effectual to



pass the estate or interest sold, and the fees and costs in all proceedings taken under this section shall be such as are payable according to the ordinary procedure of the said court.

And, when not otherwise provided, the proceedings shall be, as nearly as possible, according to the practice and procedure in force in the County Court; and when these are no guide, the practice and procedure used in the Supreme Court shall be followed, provided an appeal shall lie from any judgment or order of the said courts in like manner as in ordinary cases. 1891, c. 23, s. 16.

This section, enacted in 1887, provided a new jurisdiction and new procedure, and therefore the only procedure for giving effect to a lien under the Act was under this section. *Martin v. Russell*, (1892) 2 B.C.R. 98.

**17. Summons to show cause why lien should not be cancelled.—**Any person against whose property a lien has been registered under the provisions of this Act, may apply to a judge of the County Court, on an affidavit setting forth the registry of the same, and that hardship or inconvenience is experienced, or is likely to be experienced thereby, with the reasons for such statement, for a summons calling upon the opposite party to show cause why such lien should not be cancelled upon sufficient security being given. Such summons, together with a copy of the affidavit on which the same is granted, shall be served on the opposite party and made returnable in three days after the issuing thereof, or in such greater or less time as the judge may direct. 1891, c. 23, s. 17.

See Ont. Act, sec. 27.

**18. Judge may order cancellation of lien.—**On the return of such summons, the judge may order the cancellation of such lien, either in whole or in part, upon the giving of security by the party against whose property the said lien is registered to the opposite party, in an amount satisfactory to the said judge,

and upon such other terms, if any, as the judge may see fit to impose. 1891, c. 23, s. 18.

See Ont. Act, sec. 27.

**19. On judge's order lien to be cancelled.**—The registrar-general, district registrar, or government agent in whose office the said lien is registered shall, on the production of such order, file the same and cause the said lien to be cancelled as to the property affected by the order. 1891, c. 23, s. 19.

See amendment to this section by ch. 20, statutes of 1900, sec. 15.

See Ont. Act, sec. 27.

**20. In certain cases owner or contractor to pay costs.**—When it shall appear to the court or judge in any proceedings to enforce a lien or liens under this Act that such proceedings have arisen from the failure of any owner or contractor to fulfil the terms of his contract or engagement for the work in respect of which the liens are sought to be enforced, or to comply with the provisions of this Act, such court or judge may order the said owner or contractor or either of them, to pay all the costs of such proceedings, in addition to the amount of the contract or sub-contract, or wages due by him or them to any contractor, sub-contractor, or laborer, and may order a final judgment against such contractor or owner, or either of them, in default for such costs, with execution as provided in sec. 16 of this Act. 1891, c. 23, s. 20.

See Ont. Act, sec. 45.

**21. Leasehold property.**—If the property sold in any proceedings under this Act shall be a leasehold interest, the purchaser at any such sale shall be deemed to be the assignee of such lease. 1891, c. 23, s. 21.

The Ontario Act has no corresponding section.

**22. Distribution of proceeds of sale under Act.**— All moneys realized by proceedings under this Act shall be applied and distributed in the following order:—

(1) The costs of all the lien-holders of and incidental to the proceedings, and of registering and proving the liens:

(2) The balance shall then be divided by first paying six weeks' wages (if due) to all laborers employed by the owner, contractor, and sub-contractors (provided such balance shall be sufficient to pay six weeks' wages as aforesaid, but if not, then amount shall be divided *pro rata* among the said laborers), and the balance remaining, after paying six weeks' wages as aforesaid, shall be divided *pro rata* among the sub-contractors, and other persons employed by the owner and contractor; after all laborers, sub-contractors, and other persons employed by the owner and contractor, have been paid their liens and costs, the balance shall be paid to the contractor. 1891, c. 23, s. 22.

This section was repealed. See substitution therefor, sec. 17 of ch. 20 of the statutes of 1900.

**23. Mechanics' lien on chattels.**— Every mechanic or other person who has bestowed money or skill and materials upon any chattel in the alteration and improvement of its properties, or increasing its value, so as thereby to become entitled to a lien upon such chattel or thing for the amount or value of the money, skill, or materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have power to sell the chattel in respect of which the lien exists, on giving two weeks' notice by advertisement in a newspaper published in the city, town or county in which the work was done, or in case there is no newspaper published in such city, town or county, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel to be sold, the time and place of sale; and after such sale, such mechanic or

other person shall apply the proceeds of such sale in payment of the amount due to him, and the costs of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto, on application being made to him therefor, and a notice in writing of the result of the sale shall be left at or posted to the address of the owner at his last known place of abode or business. 1891 c. 23, s. 23.

See Ont. Act, sec. 51. See also Chapter IV, *ante*, "Mechanics' Liens upon Personalty."

#### EXPIRATION, CANCELLATION AND DISCHARGE.

**24. When a lien shall expire.**—Every lien shall absolutely cease to exist after the expiration of thirty days after the filing of the affidavit mentioned in section 8 of this Act, unless the claimant in the meantime shall have instituted proceedings to realize his lien under the provisions of this Act, and a certificate of the judge or registrar of the court wherein the proceedings are commenced, certifying that such action has been commenced, is duly filed in the office of the government agent in the city, town, or county, and in case there be no government agent in such city, town, or county, then in the land registry office of the land registry district within the limits of which the lands, mine, or premises affected by such lien are situate. 1891, c. 23, s. 24.

See amendment to this section by ch. 20 of the statutes of 1900, sec. 18. See *Dunn v. Holbrook*, (1900) 7 B.C.R. 503, and compare *Neill v. Carroll*, (1880) 28 Gr. 34, 399; *Bank of Montreal v. Haffner*, (1884) 10 A.R. 592, and *McNamara v. Kirkland*, (1891) 18 A.R. 270.

**25. When a registered lien shall be cancelled.**—The government agent, registrar-general, or district registrar of titles shall, on receiving a certificate under the seal of the registrar of the court wherein such action is pending, stating the names of the lien-holders parties to such action, and that the amount due



by the owner in respect of such liens has been ascertained and paid into court in pursuance of an order of such court or judge, or that the property has been sold to realize such liens, or that such lien has been improperly filed, or that such lien has otherwise ceased to exist, or, on receiving a statement in writing signed by the claimant or his agent that the lien has been satisfied, cancel all liens registered by such parties. 1891, c. 23, s. 25.

See ch. 20, sec. 19, of the statutes of 1900.

**26. Receipted pay-rolls of woodman's wages must be produced.**

Every person making or entering into any contract, engagement or agreement with any other person for the purpose of furnishing, supplying or obtaining timber or logs, by which it is requisite and necessary to engage and employ workmen and laborers in the obtaining, supplying and furnishing such logs or timber as aforesaid, shall, before making any payment for, or on behalf of, or under such contract, engagement or agreement, of any sum of money, or by kind, require such person to whom payment is to be made to produce and furnish a pay-roll or sheet of the wages and amount due and owing and of the payment thereof, which pay-roll or sheet may be in the form of schedule C annexed to this Act, or if not paid, the amount of wages or pay due and owing to all the workmen or laborers employed or engaged on or under such contract, engagement or agreement at the time when the said logs or timber is delivered or taken in charge for, or by, or on behalf of, the person so making such payment and receiving the timber or logs. 1891, c. 23, s. 26.

See "The Woodman's Lien for Wages Act;" (R.S.O. ch. 154).

In *Young v. West Kootenay*, (1905) 1 W.L.R. 184, the facts were as follows: Plaintiff and a large number of other wage-earners were employed by one F. to get logs from defendant's

timber limits and deliver them at defendant's saw mill. F. had a contract with defendants for the furnishing of the logs and was largely in their debt for advances made to enable him to carry on his contract. Part of this debt was secured by chattel mortgage on F.'s plant. The contract had been carried on for about a year when defendants entered into possession under their chattel mortgage, which caused all work under the contract to cease. At that time the wages sued for in this action had been earned and were unpaid. The claims for wages were accordingly all assigned to plaintiff, who brought this action to recover the aggregate amount. Plaintiff alleged that defendants were the real debtors and that in any case they were liable under secs. 26 and 27 of the M. L. Act.

Morrison, J. in deciding this case said: "I am of opinion that the words "pay roll or sheet" in section 27 must be read in the same sense as the same words in section 26. In section 26 it is evidently meant that the production of the pay roll or sheet is not sufficient in itself, but it must be shown that the wages have been actually paid. This view is rendered more clear from the words which follow, requiring the person to whom payment is to be made to show the amount due for wages when not paid, irrespective of the pay roll or sheet. Now, in section 27 the only words used are "pay roll or sheet," as mentioned in section 26, and no mention is made of any requirement to show a statement that the amount of wages due was not paid. I am also of opinion that unless the person to whom payment is to be made produces the pay-roll or sheet, with evidence of the payment of the wages to the person making payment such last mentioned person is liable for the wages if he makes payment under the contract and it afterwards turn out that the wages have not been paid. In this case no such pay-roll or sheets were produced for the months of November and December. It is true a statement of the amount of wages due was produced by defendant, but that is not sufficient in the view I take of the Act. To say that the production of a statement of the amount of wages due, irrespective of payment, is sufficient to relieve defendants from liability under section 27, would be to defeat the plain intention of the legislature and would render both sections 26 and 26 meaningless. Defendant gave F. credit on their books for the value of the logs furnished during the two months in respect to which wages are due and I think this

is a payment to him under the contract. Judgment for plaintiff with costs."

**27. Person not requiring production of receipted pay-roll shall be liable at suit of workman.**—Any person making any payment under such contract, engagement or agreement without requiring the production of the pay-roll or sheet as mentioned in section 26 of this Act, shall be liable, at the suit of any workman or laborer so engaged under said contract, engagement, or agreement, for the amount of pay so due and owing to said workman or laborer under said contract, engagement or agreement. 1891, c. 23, s. 27.

See "The Woodman's Lien for Wages Act," (R.S.O. c. 154).

See decision of Morrison, J., in *Young v. West Kootenay*, *supra*.

**28. Sums mentioned in pay-roll as unpaid to be retained.**—The person to whom such pay-roll or sheet is given shall retain, for the use of the laborers or workmen whose names are set out in such pay-roll or sheet, the sums set opposite their respective names which have not been paid, and the receipt or receipts of such laborers or workmen shall be a sufficient discharge therefor. 1891, c. 23, s. 28.

See "The Woodman's Lien for Wages Act," (R.S.O. c. 154).

**29. Government agents to transmit copies of lien records to Land Registry Offices.**—Every government agent in whose office any affidavit or document shall be filed under the provisions of this Act shall forthwith after such filing transmit to the land registry office of the land registry district within the limits of which the lands, mine, or premises affected by such affidavit or document are situate, a true copy, certified under his hand, of such affidavit or document, and the copy so certified shall be filed in such land registry office in the manner prescribed by this Act for the filing of original documents therein under this Act.

See amendment to this section by ch. 20 of the statutes of 1900, sec. 20. There is no corresponding provision in the Ontario Act.

**30. Judges of County Court to make rules of court.**—The judges of the County Court, or any two of them, may make general rules and regulations, not inconsistent with this Act, for expediting and facilitating the business before such court under this Act, and for the advancement of the interests of suitors therein. 1891, c. 23, s. 29.

There is no corresponding provision to this in the Ontario Act.

No rules have as yet been made.

**31. Repeal of former Acts.**—The “Mechanics’ Lien Act, 1888,” (being ch. 74 of the Consolidated Acts, 1888), the “Mechanics’ Lien Amendment Act, 1889,” and the “Mechanics’ Lien Amendment Act, 1890,” are hereby repealed. 1891, c. 23, s. 30.

#### SCHEDULE A.

In the matter of the “Mechanics’ Lien Act,” and in the matter of a lien claimed by

I, \_\_\_\_\_ of \_\_\_\_\_  
British Columbia, \_\_\_\_\_ make oath and say:

1. That \_\_\_\_\_ of \_\_\_\_\_ claim  
a mechanics’ lien against the property or interest hereinafter  
mentioned whereof \_\_\_\_\_ is owner.

2. That the particulars of the work done are as follows:—

3. That the work was finished or discontinued on or about  
the \_\_\_\_\_ day of \_\_\_\_\_

4. That the said [*insert name of person claiming the lien*]  
was in the employment of \_\_\_\_\_, contractor for the work  
in respect of which the lien is claimed, for \_\_\_\_\_ days  
after the above-mentioned date.



5. That the sum of \_\_\_\_\_ dollars is owing to \_\_\_\_\_ in respect of the same, and was due on the \_\_\_\_\_ day of \_\_\_\_\_

6. That the description of the property to be charged is as follows:—

Sworn at \_\_\_\_\_ B.C., this \_\_\_\_\_ day  
of \_\_\_\_\_, A.D., \_\_\_\_\_, before me  
1891, c. 23, Sch. A.

See chapter 20 of the statutes of 1900, sec. 27.

### SCHEDULE B.

#### “MECHANICS’ LIEN ACT.”

Particulars of work to be done for \_\_\_\_\_ of  
\_\_\_\_\_, owner, by  
of \_\_\_\_\_, contractor.

[Here insert nature and location of work, and nature of interest  
of owner in the land.] ..

Amount of contract, \_\_\_\_\_ dollars.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 18 ..

(Signed)

Owner.

Contractor.

1891, c. 23, Sch. B.

### SCHEDULE C.

#### PAY-ROLL.

Name.	Description.	From 5th January, 1891, to 10th January, 1891 (inclusive).			Amount paid	Date of payment.	Received payment in full.
		Number of days employed	Rate per day	Total amount earned			
R. Roe. ....		Six days	\$3.50	\$21.00	\$21.00	12th Jan. 1891	R. Roe.

I hereby certify that the above statement is correct to the best of my knowledge and belief, and is made by me in compliance and in accordance with section 12 of the "Mechanics' Lien Act," on account of (my contract to, or employment by, as the case may be), (here insert brief description of the work) for (owner's name) up to the                      day of                      , 18   .  
(Signed).

Contractor.

Dated                      day of                      , 18   .

1891, c. 23, Sch. C.

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## CHAPTER 20.

AN ACT TO AMEND THE "MECHANICS' LIEN ACT."  
R.S.B.C., ch. 132.

(31st August, 1900).

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. **Short title.**—This Act may be cited as the "Mechanics' Lien Act Amendment Act, 1900."

2. **Amends sub-sec. 1 of sec. 2. "Contractor" to include persons nishing material.**—Sub-section (1) of section 2 of the "Mechanics' Lien Act" being chapter 132 of the Revised Statutes, 1897, is hereby amended by inserting the words "or placing or furnishing materials" immediately after the word "work," in the second line thereof.

3. **Amends sub-sec. 2 of sec. 2. "Sub-contractor."** Sub-section (2) of said section 2 is hereby amended by adding immediately after the word "work," the words "or to place or furnish material."

4. **Amends sub-sec. 3 of sec. 2.—Extends meaning of term "owner."**—Sub-section (3) of said section 2 is hereby amended by inserting the words "or materials are placed or furnished" immediately after the word "done," in the third and fifth lines, respectively, thereof, and by striking out all the words after the word "work," in the seventh line thereof, and inserting in lieu thereof the words "is commenced or the material is placed or furnished in respect of which the lien is claimed."

5. **Amends sub-sec. 5 of sec. 2.—Term "laborer" extended to include "miner."**—Sub-section (5) of said section 2 is hereby amended by inserting the word "miner" immediately after the word "mechanic," in the first line thereof.

**6. Amends sec. 2 by adding sub-sec. (6).—**Said section 2 is hereby amended by adding the following sub-section thereto:—

(6) "**Material.**" "Material shall include every kind of movable property."

**7. Re-enacts sec. 4.—**Section 4 of the said ch. 132 is hereby repealed, and the following substituted therefor:—

"**4. Mechanics, miners, contractors, material men and others to have lien.**—Unless there is an agreement in writing to the contrary, signed by the person claiming the lien, every contractor, sub-contractor, laborer and furnisher of material doing or causing work to be done upon, or placing or furnishing any materials to be used in or for the construction, erection, alteration or repairs, either in whole or in part of, or addition to, any building, tramway, railway, erection, wharf, bridge, or other work, or doing or causing work to be done upon, or in connection with, or the placing or furnishing of materials to be used in or for the clearing, excavating, filling, grading, track laying, draining or irrigating of any land in respect of a tramway, railway, mine, sewer, drain, ditch, flume or other work, or improving any street, road or sidewalk adjacent thereto, at the request of the owner of such land, shall, by virtue thereof, have a lien or charge for the price of such work, and the placing or furnishing of such materials upon such building, erection, wharf, machinery, fixture or other works and all materials furnished or procured for use in constructing or making such works or improvements so long as the same are about to be in good faith worked into or made part of the said works or improvements, and the land, premises and appurtenances thereto, occupied thereby or enjoyed therewith, but limited in amount as hereinafter mentioned: Provided such lien shall affect only such interest in the said land, premises and appurtenances thereto as is vested in the owner at the time the works or improvements are commenced, or any greater interest the owner



may acquire during the progress of the works or improvements, or have at any time during which the lien stands as an incumbrance against said land."

"(a) **Interpretation of "mortgage."**—'Mortgage' in this section shall not include any part of the principal sum secured thereby not actually advanced to the borrower at the time the works or improvements are commenced, and shall include a vendor's lien and an agreement for the purchase of land, and for the purposes of this Act, and within the meaning thereof, the purchaser shall be deemed a mortgagor and the seller a mortgagee."

**9. Material subject to lien.**—When any material is brought upon any land to be used in connection with such land for any of the purposes enumerated in section 7 of this Act, the same shall be subject to a lien for the unpaid price thereof in favor of the person supplying the same, until it is put or worked into the building, erection or work as part of the same.

**10. Amends sec. 7.**—Section 7 of the said ch. 132 is hereby amended by adding thereto the following sub-section:—

"(a) **Notice by owner that he will not be responsible for work done on his land.**—Whenever such owner or such person, not having contracted for or agreed to such construction, alteration, repair, works or improvements being done or made, but who has failed to give said notice within the said three days, shall post a notice in writing in some conspicuous place upon said land or upon the buildings or improvements thereon, to the effect that he will not be responsible for the works or improvements, no works or improvements made after such posting shall give any right as against such owner or person, or his interest in said land, to a lien under this Act."

**11. Insurance moneys.**—Where any of the property, upon which a lien is given by this Act, is wholly or partly destroyed

by fire, any insurance receivable thereon by the owner, prior mortgagee or chargee, shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in section 6 of said ch. 132, be subject to the claims of all persons for liens to the same extent as if such moneys were realized by the sale of such property in an action to enforce a lien.

**12. Re-enacts sec. 8.**—Section 8 of said ch. 123 is hereby repealed, and the following substituted therefor:—

**“8. Lien expires in 31 days after completion of work, unless registered.—Exception as to mine.—Registration to be in county court registry.**—Every lien upon any such building, erection, mine, works or improvements, or land, shall absolutely cease to exist after the expiration of thirty-one days, except in the case of a claim for wages owing for work in, at or about a mine, in which case the lien shall cease after the expiration of sixty days after the works or improvements shall have been completed, or after the claimant has ceased from any cause to work thereon, or place or furnish the materials therefor (provided, however, that any laborer shall not be held to have ceased work upon any building, erection, mine, works or improvements until the completion of the same, if he has in the meantime been employed upon any other work by the same contractor), unless in the meantime the person claiming the lien shall file in the nearest County Court registry in the county wherein the land is situate an affidavit, sworn before any person authorised to take oaths, stating in substance:—

(a) The name and residence of the claimant, and of the owner of the property or interest to be charged:

(b) The particulars of the kind of works or improvements done, made or furnished:

(c) The time when the works or improvements were finished or discontinued:

(d) The sum claimed to be owing, and when due:

(e) The description of the property to be charged: which affidavit shall be received and filed as a lien against the property, interest or estate. Every County court registrar shall be supplied with printed forms of such affidavits, in blank, which may be in the form or to the effect of Schedule A to this Act, and which shall be supplied to every person requesting the same and desiring to file a lien. Every County Court registrar shall keep an alphabetical index of all claimants of liens, and the persons against whom such liens are claimed, which index shall be open for inspection during office hours, and it shall be the duty of such County Court registrar to decide whether his is or is not the proper office for the filing of such affidavit, and to direct the applicant accordingly; and no affidavit shall be adjudged insufficient on the ground that it was not filed in the proper County Court registry."

**13. Mode of construing sec. 8 of ch. 132, as re-enacted by sec. 12 of this Act.**— A substantial compliance only with sec. 12 of this Act shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless in the opinion of the court or judge adjudicating upon the lien under the said Act the owner, contractor, sub-contractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is prejudiced, and the court or judge may allow the affidavit and statement of claim to be amended accordingly.

An affidavit stating that work finished or discontinued "on or about" a stated date was held sufficient. *Holden v. Bright Prospects G. M. Co.*, (1899) 6 B.C.R. 439.

Particulars of claim in affidavit for lien were:—"The putting in bath-tubs, wash-tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, \$220. Part was for material and part for labor. It was held, Davie, C.J., dissenting, that the statement was fatally defective, as including two classes, in regard to one of which there was no statutory lien. Davie, C. J., was of the opinion

that the particulars were sufficient and that the separation of the price of the labor from that of the material was a function of the court exerciseable at the trial. *Weller v. Shupe*, (1897) 6 B.C.R. 58. In another case the particulars for lien were:—"Brick and stone work and setting tiles in the house situate upon the land hereinafter described, for which I claim the balance of \$123. Held, insufficient, *Knott v. Cline*, (1896) 5 B.C.R. 120.

Under the Mechanics' Lien Act of 1888 it was held that the affidavit must be strictly followed in order to validate the lien. *Smith v. McIntosh*, (1893) 3 B.C.R. 26.

**14. Amends sec. 9.**—Statement by contractor showing work to be done to be filed in County Court Registry.—Section 9 of the said ch. 132 is hereby amended by striking out all the words beginning with "office" in the fifth line and ending with "district" in the eighth line, and substituting the words "nearest County Court registry in the county."

**15. Amends sec. 19.**—Section 19 of the said ch. 132 is hereby amended by striking out all the words in the first line and substituting the words "The County Court registrar."

**16. Owner's liability as to wages unpaid by contractor.**—No lien, except for not more than six weeks' wages, in favor of laborers shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor.

**17. Re-enacts sec. 22.**—Section 22 of said chapter 132 is hereby repealed and the following substituted therefor:—

"22. Distribution of moneys realized under Act.—All moneys realized by proceedings under this Act shall be applied and distributed in the following order:—

"FIRST,—The cost of all the lien-holders of and incidental to the proceedings, and of registering and proving the liens;



“SECOND,—Six weeks’ wages (if so much be owing) of all laborers employed by the owner, contractor and sub-contractor;

“THIRD,—The several amounts owing for material, placed or furnished, in respect of the works or improvements;

“FOURTH,—The amounts owing the sub-contractor and other persons employed by the owner and contractor;

“FIFTH,—The amount owing the contractor.

“Each class of lien-holders shall rank *pari passu* for their several amounts, and the portions of said moneys available for distribution shall be distributed among the lien-holders *pro rata* according to their several classes and rights.

“Any balance of said moneys remaining after all the above amounts have been distributed shall be payable to the owner or other person legally entitled thereto.

“Provided, however, that when any laborer has more than six weeks’ wages owing to him, by any sub-contractor, contractor or owner, the court or judge shall cause the extra sum beyond six weeks’ wages to be deducted out of any sum actually coming under the above distribution to such sub-contractor, contractor or owner, and shall order the same to be paid to such laborer.

“(a) **Interpretation of term ‘wages.’**—‘Wages’ shall mean money earned by a laborer for work done whether by time or as piece-work.”

**18. Amends sec. 24.**—Lien to be enforced by proceedings in County Court registry.—Section 24 of the said ch. 132 is hereby amended by striking out all the words of the section after the word “Act” in the fourth line, and substituting the words “in the County Court registry in which the lien was filed.”

**19. Re-enacts sec. 25.**—Section 25 of the said ch. 132 is hereby repealed and the following substituted therefor:—

**“25. Cancellation of lien.—** The County Court registrar shall cancel any lien when the amount due in respect thereof has been ascertained and paid into court in pursuance of an order of the court or judge, or the property has been sold to realize such lien, or such lien has been improperly filed or has otherwise ceased to exist, or on receiving a statement in writing signed by the claimant or his agent that the lien has been satisfied.”

**20. Amends sec. 29.—**Section 29 of the said chapter 132 is hereby amended by striking out the words “government agent,” in the first line thereof, and substituting therefor the words “County Court registrar.”

**21. Amount for which lien may be filed.—**No lien shall be filed unless the claim or joined claims shall amount to or aggregate twenty dollars or more.

**22. Devices to defeat priority of wage-earners void.—**Every device by an owner, contractor or sub-contractor, adopted to defeat the priority given to wage-earners for their wages by this Act, shall, as against such wage-earners, be null and void.

**23. Judgment for amount of claim.—**Upon the hearing of any claim for a lien the court or judge may so far as the parties before him, or any of them, are debtor and creditor, give judgment against the former in favor of the latter for any indebtedness or liability arising out of the claim in the same manner and to the same extent as if such indebtedness or liability had been sued upon in the County Court in the ordinary way, without reference to the said chapter 132.

**24. No appeal where judgment for less than \$250.—**Where in any action for a lien the amount claimed to be owing is adjudged to be less than two hundred and fifty dollars the judgment shall be final, binding and without appeal.

**25. Certain proceedings not to be deemed satisfaction or waiver of lien.**—The taking of any security for, or the acceptance of any promissory note for, or cheque which on presentation is dishonored, or the taking of any other acknowledgment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this Act, unless the lien-holder agrees in writing that it shall have that effect: Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit of this section shall institute proceedings to enforce such lien within the time limited by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time: Provided, further, that notwithstanding such extension of time, such person may, where proceedings are instituted by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such suit or action as if no such extension had been given.

A lien lost by taking promissory note is not revived upon dishonor thereof. *Edmonds v. Tiernan*, (1891) 2 B.C.R. 82; 21 S.C.R. 406.

**26. Construction of this Act.**—So far as any claim shall be made for material placed or furnished prior to the passing of this Act or for any wages in excess of those allowed by the “Mechanics’ Lien Act,” this Act shall not prejudice any person with respect thereto, beyond the actual indebtedness (if any) of such person to the claimant.

**27. Re-enacts Schedule A.**—Schedule A to the said chapter 132 is hereby repealed and Schedule A to this Act substituted therefor.

## SCHEDULE A.

"In the matter of the 'Mechanics' Lien Act,' and in the matter of a lien claimed by

"I, \_\_\_\_\_ of \_\_\_\_\_,  
British Columbia, \_\_\_\_\_ make oath and say:—

"1. That \_\_\_\_\_ of \_\_\_\_\_ claim a mechanic's lien against the property or interest hereinafter mentioned whereof \_\_\_\_\_ residing at \_\_\_\_\_ is owner.

"2. That the particulars of the work done, or materials furnished, are as follows:—

"3. That the work or materials were finished, furnished or discontinued on or about the \_\_\_\_\_ day of \_\_\_\_\_.

"4. That the said \_\_\_\_\_ was in the employment of \_\_\_\_\_, contractor for the work in respect of which the lien is claimed for \_\_\_\_\_ days after the above-mentioned date.

"5. That the sum of \_\_\_\_\_ dollars is owing to \_\_\_\_\_ in respect of the same, and was or will be due on the \_\_\_\_\_ day of \_\_\_\_\_.

"6. That the description of the property to be charged is as follows:—

" Sworn at \_\_\_\_\_ B. C. this \_\_\_\_\_ day  
of \_\_\_\_\_, A.D., \_\_\_\_\_, before me \_\_\_\_\_."

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## CHAPTER 35.

AN ACT TO AMEND THE "MECHANICS' LIEN ACT."  
(R.S. 1897, ch. 132.)

10th February, 1904.

**H**IS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

**1. Short title.**—This Act may be cited as the "Mechanics' Lien Act Amendment Act, 1904."

**2. Sections added.** Said chapter 132 is hereby amended by adding thereto the following sections:—

*"Costs."*

**"32. Limit of fees in money or stamps.**—No fees, in stamps or money, shall be payable to any judge or other officer in any action brought to realize a lien under this Act, nor on any filing, order, record or judgment, or other proceeding in such section, excepting that every person, other than a wage-earner, shall, on filing his statement of claim where he is a plaintiff, or on filing his claim where he is not a plaintiff, pay in stamps one dollar on every one hundred dollars, or fraction of one hundred dollars, of the amount of his claim up to one thousand dollars.

**"33. Limit of costs to plaintiff.**—The costs of the action under this Act awarded by the judge or officer trying the action, to the plaintiffs and successful lien-holders, shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment, besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge or other officer who tries the action may direct.



**“34. Limit of costs to be awarded against plaintiff.**—Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge or said other officer may direct.

**“35. Costs where least expensive course not taken.**—In case the least expensive course is not taken by a plaintiff under this Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken.

**“36. Costs of vacating lien.**—Where the lien is discharged or vacated under section 19 of this Act, or where in an action judgment is given in favor of or against a claim for a lien, in addition to the costs of an action, the judge or other officer may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration of the lien.

**“37. The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the judge or officer to whom the application or order is made.”**

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## REVISED STATUTES OF NOVA SCOTIA, 1900.

## CHAPTER 171.

## OF LIENS OF MECHANICS AND OTHERS.

## SHORT TITLE.

1. **Short title.**—This chapter may be cited as “The Mechanics’ Lien Act.” 1899, c. 29, s. 1.

## INTERPRETATION.

2. **Interpretation.**—In this chapter, unless the context otherwise requires, the following expressions shall be construed in the manner in this section mentioned:—

(a) **“Contractor.”**—“Contractor” means a person contracting with, or employed directly by, the owner or his agent for the doing of work, or for furnishing or placing materials or machinery for any of the purposes mentioned in this chapter.

(b) **“Sub-contractor.”**—“Sub-contractor” means a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by the contractor, or by some other person who has contracted with or is employed by the contractor.

(c) **“Owner.”**—“Owner” includes any person, firm, company, corporation, or association having any estate or interest in the lands upon, or in respect to, which the work is done, or machinery or materials are furnished or placed, at whose request and upon whose credit, or upon whose behalf or with whose privity or consent, or for whose direct benefit, any such work is done, or machinery or materials placed or furnished, and any person claiming under him whose rights are acquired after the work in respect to which the lien is claimed is commenced to be done, or the materials furnished have been commenced to be furnished.

(d) **“Person.”**—“Person” includes a body corporate, firm, partnership or association.

(e) **"Materials."**—"Materials" includes every kind of movable property.

(f) **"Wages."**—"Wages" means money earned by the mechanic or laborer for work done, whether by the day or as piece work.

(g) **"Registrar."**—"Registrar" means registrar of deeds. 1899, c. 29, s. 2.

See Ont. Act., sec. 2, and notes thereunder.

The Ontario Act includes a municipal corporation and a railway company under the definition of "owner."

A foreign corporation would be entitled to acquire a lien under this Act. See *Bank of Montreal v. Condon*, (1896) 11 Man. 366.

#### LIEN, PERSON ENTITLED TO, CREATION AND EFFECT OF.

**3. When lien arises.**—(1) Unless he signs an express agreement to the contrary, every person who performs any work or service upon or in respect to, or places or furnishes any material to be used in the construction, fitting, alteration, improvement, or repair of, any erection, building, road, railway, wharf, pier, bridge, mine, well, excavation, sidewalk, pavement, drain, or sewer, or the appurtenances to any of them, for any owner, contractor, or sub-contractor, shall by virtue thereof, have a lien for the price of such work, services, or materials upon the erection, building, road, railway, wharf, pier, bridge, mine, well, excavation, sidewalk, pavement, drain, or sewer, and upon the appurtenances to any of them, and the lands occupied thereby or enjoyed therewith, or upon or in respect to which such work or service is performed, or upon which such materials are furnished or placed to be used; limited, however, in amount to the sum justly due to the person entitled to the lien and the sum justly owing (except as in this chapter provided) by the owner.

(2) Such lien, upon registration, as in this chapter provided, shall attach and take effect from the date of the registration as against subsequent purchasers, mortgagees, or other incumbrances. 1899, c. 29, s. 4.

See Ont. Act, sec. 4, and cases cited. See also, *post*, p. 286.

The word "road" is not in the Ontario Act. This section omits the words "land," "bulkhead," "trestlework," "vault," "fence," "fountain," "fishpond," "aqueduct," "roadbed," "way," "fruit and ornamental trees," which are used in the Ontario Act. At least some of these things specified, however, in the Ontario Act, would probably be held to be covered by the words "any erection, building, . . . or the appurtenances to any of them" in this section.

As to what constitutes a building or erection, see a large number of cases cited in *Adamson v. Rogers*, (1895) 22 A.R. 415.

C. & W., who were awarded a contract to place heating apparatus in a hotel building owned by the defendant D., ordered materials required from plaintiffs in a letter stating: "We have secured contract for hotel which requires above goods." Held, that these words sufficiently identified the building for which the goods were required. *Dominion Radiator Co. v. Cann et al.*, (1904) 37 N.S.R. 237.

**4. Upon what lien attaches.**—(1) The lien shall attach upon the estate or interest of the owner in the erection, building, road, railway, wharf, pier, bridge, mine, well, excavation, sidewalk, pavement, drain, or sewer, and upon the appurtenances to any of them, and the lands occupied thereby or enjoyed therewith.

(2) Where the estate or interest charged by the lien is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to the lien; provided that such consent is testified by the signature of the owner upon the statement of claim at the time of the registering thereof, and verified as in this chapter provided. 1899, c. 29, s. 5.

See Ont. Act, sec. 7 (1) and (2), and notes thereunder.

**5. When property destroyed by fire.**—Where any of the property upon which a lien is given by this chapter is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by the owner shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge, be subject to the claims of all persons for liens to the same extent as if such moneys were realized by sale of such property in an action to enforce a lien. 1899, c. 29, s. 6.

See Ont. Act, sec. 8.

**6. Amount of lien.**—Except as in this chapter is otherwise provided, a lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. 1899, c. 29, s. 7.

See Ont. Act, sec. 9.

**7. Amount in case of person other than contractor.**—Except as in this chapter is otherwise provided, where the lien is claimed by any other person than the contractor, the amount of such lien shall be limited to the amount owing to the contractor, or subcontractor, or other person for whom such work or service has been done, or the materials have been furnished or placed for such work, service, or materials. 1899, c. 29, s. 8. By Chapter 68 of the Acts of 1903 this section was amended by adding to it the words “at the date at which said lien is claimed.”

See Ont. Act, sec. 10.

**8. Deductions in favor of sub-contractors, etc.**—(1) In all cases the person primarily liable on any contract under or by virtue of which a lien may arise under the provisions of this chapter shall, as the work is done or materials are furnished under such contract, deduct from any payments made by him in respect to such contract, and retain for the period of thirty days after the completion or abandonment of the contract, fifteen per cent. of the value of the work, services, and materials actually done, furnished, or placed, and such value shall be cal-



culated on the basis of the price to be paid on the whole contract; and the liens created by this chapter shall be a charge upon the amounts so retained under this section in favor of sub-contractors whose liens are derived under persons to whom such moneys so retained are respectively payable.

(2) All payments up to eighty-five per cent. of such value made in good faith by the owner to the contractor, by the contractor to the sub-contractor, or by one sub-contractor to any other sub-contractor, before notice in writing of such lien has been given by the person claiming the lien to the owner, contractor, or sub-contractor, shall operate as a discharge *pro tanto* of the lien created by this chapter.

(3) Payment of the moneys required to be retained under this section may be validly made so as to discharge all liens or charges under this chapter in respect thereto after the expiration of the period of thirty days mentioned in this section, unless proceedings have been previously taken under this chapter to enforce any lien or charge against the moneys so retained. 1899, c. 29, s. 9.

See Ont., Act, sec. 11, and notes thereunder.

B. contracted with the defendant company to transfer to them a quantity of land, and to erect and equip a mill and to do other work, for an agreed sum in bonds and shares of the company and other considerations. It was subsequently agreed, verbally, that a portion of the proceeds of the bonds and shares transferred to B. should be retained by a trust company as security for the performance by B. of his contract for the erection of the mill, to be paid out as the work progressed. In an action against the company by the sub-contractor by whom the machinery for the mill was supplied:—Held, that in the absence of notice, the company are not liable to plaintiff for failure to retain out of the moneys paid to B. the percentage required to be retained under the provisions of the Act. Also that the transaction which took place when the title to the property was transferred to the company, and the bonds and shares, the considera-

tion therefor, were delivered to B., was not one within the provisions of sec. 8 of the Act and that the company was not required to retain anything on that date for the benefit of future contractors. *Smith Co. v. Sissiboo, etc., Co.*, (1903) 36 N.S.R. 348.

On appeal to the Supreme Court of Canada this judgment was affirmed, and it was held that sec. 8 which requires the owner to retain fifteen per cent. of the contract price until the work is completed did not apply, as no price for building the mill was specified, but the price was associated with other considerations from which it could not be separated. *Smith Co. v. Sissiboo, etc., Co.*, (1904) 35 S.C.R. 93.

**9. Payments for work, etc., when allowed against contractor, etc.**—If the owner or contractor makes payments to any person who has performed work or service, or placed or furnished materials, in manner as in this chapter previously specified, for, or on account of, any debts justly due to them for work or service so done, or for materials furnished or placed to be used as so specified, and within three days afterwards gives, by letter or otherwise, written notice of such payment to the contractor, or his agent, or to the sub-contractor, or his agent, as the case may be, such payments shall, as between the owner and the contractor, or as between the contractor and the sub-contractor, be deemed to be payments to the contractor or the sub-contractor on his contract generally, but not so as to affect the percentage to be retained by the owner, as provided by the next preceding section of this chapter. 1899, c. 29, s. 10.

See Ont. Act, sec. 12.

**10. Priority of liens.**—(1) Any lien created by this chapter shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued, or made after such lien arises, and over all conveyances or mortgages made after registration of such lien as in this chapter provided.

(2) In case of an agreement for the purchase of land, and the purchase money, or any part thereof, is unpaid, and no conveyance made to the purchaser, the purchaser shall, for the purposes of this chapter, be deemed the mortgagor, and the seller the mortgagee.

(3) Except as is otherwise provided by this chapter, no person entitled to a lien on any property, or to a charge on any moneys under this chapter, shall be entitled to any priority or preference over any other person of the same class, entitled to a lien or charge on such property or moneys under this chapter, and each class of lien-holders, except as is otherwise provided by this chapter, shall rank *pari passu* for their several amounts, and the proceeds of any sale shall, subject as aforesaid, be distributed among the lien-holders *pro rata*, according to their several classes and rights. 1899, c. 29, s. 11.

See Ont. Act, sec. 13.

**11. Lien of mechanic, etc., for wages, priority of.**—(1) Every mechanic or laborer whose lien is for work done for wages shall, to the extent of thirty days' wages, have priority over all liens derived through the same contractor, or sub-contractor on the fifteen per cent. directed to be retained under this chapter, to which the contractor or sub-contractor, through whom such lien is derived, is entitled, and all such mechanics and laborers shall rank *pari passu* on such fifteen per cent.

(2) A lien for wages may be enforced in respect to a contract not completely fulfilled.

(3) If the contract has not been completely fulfilled when a lien is claimed for wages, the percentage required to be retained shall be calculated on the work done, or materials furnished or placed by the contractor or sub-contractor by whom the person claiming such lien is employed.

(4) Where the contractor or sub-contractor makes default in completing his contract, the percentage required to be retained shall not, as against a person claiming a lien for wages under this chapter, be applied to the completion of the contract, or for any other purpose, by the owner or contractor, nor to the payment of damages for non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim of any kind against the contractor or sub-contractor.

(5) Every device by any owner, contractor, or sub-contractor adopted to defeat the priority given to liens for wages by this chapter shall, as respect the holders of such liens, be null and void. 1899, c. 29, s. 12.

See Ont. Act, sec. 14.

**12. (1) Materials, etc., not to be removed.**—During the continuance of the lien no portion of any materials or machinery affected thereby shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to the Supreme Court, or a judge thereof, or to the County Court or a judge thereof, respectively, according as the claim is over or under the sum of four hundred dollars. See Chapter 15 of the Acts of 1903-4 amending this section.

(2) The court or a judge to whom any such application is made, may make such order as to the costs of and incidental to the application as he deems just. 1899, c. 29, s. 13, (part).

See Ont. Act, sec. 16 (1) and (2).

**13.** Where any materials are actually brought upon any land to be used in connection with such land for any of the purposes previously specified in this chapter, the same shall be subject to a lien in favor of the person supplying the same until put in the building, erection, or work. 1899, c. 29, s. 13 (part).

See Ont. Act, sec. 16 (3). See also *post*, p. 286.



**14. Registration of claim.**—A claim for lien may be registered in the registry of deeds for the registration district in which the land is situated. 1899, c. 29, s. 14.

See Ont. Act, sec 17 (1).

**15. (1) Contents and form of claim.**—A claim for lien shall state,

- (a) the name and residence of the person claiming the lien, and of the owner of the property to be charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property proposed to be charged) and of the person for whom and on whose credit the work or service was, or is to be, done, or materials or machinery furnished or placed, and the time within which the same was, or is to be, done, or furnished or placed;
- (b) a short description of the work or service done, or to be done, or materials or machinery furnished or placed, or to be furnished or placed;
- (c) the sum claimed as due or to become due;
- (d) a description of the land to be charged;
- (e) the date of expiry of the period of credit, if any, agreed upon by the lien-holder for payment for his work or service or materials, where credit has been given.

(2) The claim may be in one of the forms A or B in the schedule to this chapter, or to the like effect, and shall be verified by the affidavit (form C) of the person claiming the lien, or of his agent or assignee having a personal knowledge of the matters required to be verified, and the affidavit of the agent, or assignee shall state that he has such knowledge.

(3) Where it is desired to register a claim for lien against the lands of a railway company, it shall be a sufficient description of such lands to describe them as the lands of such railway company, and every such claim for lien shall be registered



in the registry of deeds for the registration district in which such lien is claimed to have arisen. 1899, c. 29, s. 15.

See Ont. Act, sec. 17 (a), (b), (c), (d), (e) (2), (3), and notes thereunder.

**16. Union of claims.**—A claim for lien may include claims against any number of properties, and any number of persons claiming liens on the same property may unite therein (form D), but when more than one lien is included in one claim, each lien shall be verified by affidavit (form C), as provided in the next preceding section of this chapter. 1899, c. 29, s. 16.

See Ont. Act, sec. 18.

**17. Irregularity not to invalidate lien.**—(1) Substantial compliance only with the next two preceding sections of this chapter shall be required, and no lien shall be invalidated by reason of the failure to comply with any of the requisites of such sections, unless in the opinion of the court or judge who has power to try the action under this chapter, the owner, contractor, or sub-contractor, or mortgagee, or any other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section contained shall be construed as dispensing with the registration required by this chapter. 1899, c. 29, s. 17.

See Ont. Act, sec. 18.

**18. Registrar to register, fees.**—The registrar, upon payment of a fee of twenty-five cents, shall register the claim so that the same may appear as an incumbrance against the land so described. 1899, c. 29, s. 18.

See Ont. Act, sec. 20 (1).

**19. Registry Act to apply.**—Where the claim for lien is so registered the person entitled to such lien shall be deemed the pur-

chaser *pro tanto* and within the provisions of the Registry Act, but, except as in this chapter provided, the Registry Act shall not apply to any lien arising under this chapter. 1899, c. 29, s. 19.

See Ont. Act. sec. 21.

**20. Registration in other cases.**—(1) A claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract, or within thirty days after the completion thereof.

(2) A claim for lien upon materials or machinery may be registered before or during the furnishing or placing thereof, or within thirty days of the furnishing or placing of the last materials or machinery so furnished or placed.

(3) A claim for lien for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work for which the lien is claimed. 1899, c. 29, s. 20.

See Ont. Act, sec. 22(1)(2)(4). By Chapter 27 of the N. S. Acts of 1902 the word "for" was substituted for the word "upon" in sub-sec. 2.

One Rhuland had a contract with Wright for the construction of some houses. Dempster & Co. were the sub-contractors and supplied Rhuland on his credit with materials for the work, the whole of which was delivered before the 28th April, 1900. On the 18th May, 1900, Dempster & Co. registered a lien against the property under the Mechanics' Lien Act, 1899, but no proceedings were instituted by them to realize the claim until 13th August, 1900. On an application to set aside Dempster's lien, Ritchie, J., delivered the following judgment: "I think the word contract in the 20th section of the Act means the original contract with the owner and not the contract between the contractor and a sub-contractor. If no claim had been registered, Dempster & Co. could, I think, have registered one at any time within thirty days after the completion of that contract. There seems to be no reference to the abandonment of the contract except in section 9, but in view of that section I am inclined to the opinion that an abandonment would be held as equivalent to a comple-

tion, and no claim could be registered after thirty days from the abandonment of a contract. In this case no period of credit is mentioned in the claim and Mr. Dempster has sworn in an affidavit attached to the claim that none was given nor is the lien claimed upon materials or machinery as provided by section 20, sub-section 2. The difficulty, I think, arises in construing the words 'after the work or service has been completed,' in the cases of sub-contractors. Does this mean after the original contract has been completed or after the completion of the sub-contract. Sub-sections 2 and 3 of section 22 of the Ontario Act have been omitted from the corresponding section (20) of our Act, and decisions on these sections, including *Hall v. Hogg*, 20 O.R. 15, are not, I think, applicable. Application dismissed." *Dempster v. Wright*, (1900) 21 C.L.T. 88.

#### WHEN LIEN SHALL CEASE.

**21. Unregistered claim, lapse of.**—Every lien which is not duly registered under the provisions of this chapter shall absolutely cease to exist on the expiration of the time by this chapter limited for the registration thereof, unless in the meantime an action is commenced to realize the claim, or in which the claim may be realized under the provisions of this chapter, and a certificate thereof (form E) (which may be given by the proper officer of the court in which the proceedings are instituted) is duly registered in the registry of deeds for the registration district in which the lands in respect to which the lien is claimed are situated. 1899, c. 29, s. 21.

See Ont. Act, sec. 23.

**22. Registered lien to lapse unless action brought.**—Every lien which has been duly registered under the provisions of this chapter shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed, or the materials or machinery furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime proceedings are instituted to realize the claim under the provisions of this chapter, and a cer-

tificate registered as required by the next preceding section. 1899, c. 29, s. 22.

See Ont. Act sec. 24 (1).

#### TRANSMISSION OF LIEN.

**23. Transmission of lien.**—In case of the death of a lien-holder, his right of lien shall pass to his personal representatives, and the right of a lien-holder may be assigned by an instrument in writing. 1899, c. 29, s. 23.

See Ont. Act, sec. 26.

#### DISCHARGE OF LIEN.

**24. Discharge of lien.**—(1) A lien may be discharged by a receipt signed by the claimant, or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and registered. The fee shall be the same as the fee for registering a claim of lien.

(2) Upon application the court or judge having power to try an action to realize a lien may receive security or payment into court in lieu of the amount of the claim and costs, and may thereupon order that the registration of such lien be vacated.

(3) The court or judge may, upon any other ground, order that the registration of any lien be vacated.

(4) Where the certificate that proceedings have been taken to realize any lien has not been registered within the time limited by this chapter, and an application is made to vacate the registration of such lien after the time for registration of such certificate, the applicant shall not be required to give notice of the application to the person claiming the lien, and the order vacating the lien may be made *ex parte* upon production of the certificate of the registrar, certifying the facts entitling the applicant to such order. 1899, c. 29, s. 24.

See Ont. Act, sec. 24.

**25. Security, etc., taking of not to affect lien.**—The taking of any security for the claim, or the acceptance of any promissory note therefor, or the taking of any other acknowledgment thereof, or the giving of time for the payment of the claim, or the taking of any proceedings for the recovery of the claim, or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this chapter, unless the lien-holder agrees in writing that it shall have that effect: Provided, however, that no person who has extended the time for payment of any claim for which he has a lien under this chapter, shall obtain the benefit of this section unless he commences an action to enforce such lien within the time limited by this chapter, and registers a certificate that such proceedings have been taken as required by this chapter, but no further proceedings shall be taken in the action until the expiration of such extension of time: and provided, further, that notwithstanding such extension of time, such person may, where an action is commenced by any other person to enforce a lien upon the same property, prove and obtain payment of his claim in such action as if no such extension had been given. 1899, c. 29, s. 25.

See Ont. Act, sec. 28.

#### LIEN-HOLDER ENTITLED TO INFORMATION AND INSPECTION.

**26. Lien-holder may demand inspection of contract.**—Any lien-holder or person entitled to a lien may at any time demand of the owner, or his agent, the terms of the contract or agreement with the contractor for and in respect to which the work, service, or materials is or are performed, or furnished or placed, and if such owner or his agent,—

- (a) does not at the time of such demand, or within a reasonable time thereafter, inform the person making such demand of the terms of such contract or agreement, and the amount due or unpaid on such contract or agreement;  
or,



(b) intentionally or knowingly falsely states the terms of such contract or agreement, or the amount due and unpaid thereon,

and if the person claiming the lien sustains loss by reason of such refusal, or neglect, or false statement, such owner shall be liable to him in an action therefor to the amount of such loss. 1899, c. 29, s. 26.

See Ont. Act, sec. 29.

**27. Order of judge for inspection.**—The court or judge having power to try an action to enforce a lien may, on a summary application at any time before or after any action is commenced for the enforcement of such lien, make an order for the owner or his agent to produce and allow any lien-holder to inspect any such contract, and may make any order in respect to the costs of such application and order as is just. 1899, c. 29, s. 27.

See Ont. Act, sec. 30.

#### ENFORCEMENT OF LIENS, PROCEDURE.

**28. Jurisdiction of court and procedure.** (As amended by Chapter 25 of the Acts of 1903-4.—(1) The lien created by this chapter may be enforced by action to be brought and tried in the county court of the county court district in which the lands are situated, whether the amount claimed is over eight hundred dollars or not, and according to the ordinary procedure of such court, except where the same is varied by this chapter.

(2) Without issuing a writ of summons, an action under this chapter shall be commenced by filing in the office of the clerk a statement of claim verified by affidavit. Such affidavit shall be in the form F in the schedule, or to the like effect.

(3) Any number of lien-holders claiming liens on the same property may join in the action, and any action brought by a lien-holder shall be taken to be brought on behalf of all other lien-holders on the property in question.

(4) It shall not be necessary to make any lien-holders defendants to the action, but all lien-holders served with a notice of trial shall, for all purposes, be treated as if they were parties to the action.

(5) Every such lien-holder who is not a party to the action shall file his claim, verified by affidavit (form G).

(6) The statement of claim shall be served within one month after it is filed, but the court or judge having power to try the action may extend the time for service thereof. 1899, c. 29, ss. 28, 29.

See Ont. Act, sec. 31. See also *McDonald v. Consolidated G. M. Co.*, (1901) 21 C.L.T. 482, and *Pennington v. Morley*, (1902) 3 O.L.R. 514, as reported *ante*, at p. 154.

**29. Joinder of claims.**—The statement of defence may be in one of the forms H or I, and the affidavit of verification in the form J. The time for delivering a statement of defence shall be the same as for entering an appearance in an action in the Supreme Court.

See Ont. Act, sec. 31 (3).

**30. Trial and powers of court.**—(1) After the delivery of the statement of defence, where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action otherwise than at the ordinary sittings of the court, either party may apply to a judge who has power to try the action to fix a day for the trial thereof, and the judge shall make an appointment fixing the day and place of trial, and on the day appointed, or on such other day to which the trial is adjourned, shall proceed to try the action and all questions which

arise therein, or which are necessary to be tried to fully dispose of the action, and to adjust the rights and liabilities of the persons appearing before him, or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all inquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of the action, and of all matters, questions and accounts arising in the action, or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action, or who have been served with the notice of trial, and shall embody all results in the judgment. (Form K.)

(2) The judge who tries the action may order that the estate or interest charged with the lien be sold, and when by the judgment a sale of the estate or interest charged with the lien is ordered, the judge who tries the action may direct the sale to take place at any time after judgment, allowing, however, a reasonable time for advertising such sale.

(3) The judge who tries the action may also order the sale of any materials, and authorize the removal thereof.

(4) Any lien-holder who has not proved his claim at the trial of any action to enforce a lien, on application to the judge who tried the action, upon such terms as to costs and otherwise as are just, may be let in to prove his claim at any time before the amount realized in the action for the satisfaction of liens has been distributed, and where such claim is proved and allowed, the judge shall amend the judgment so as to include such claim therein.

(5) Any lien-holder for an amount not exceeding one hundred dollars, or any lien-holder not a party to the action, may attend in person at the trial of an action to enforce a lien, and on any proceedings in such action, or may be represented thereat or thereon by a solicitor.

(6) Where a sale is had the moneys arising therefrom shall be paid into court to the credit of the action, and the judge upon whose order the lands were sold shall direct to whom such moneys shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in connection therewith; and where sufficient to satisfy the judgment and costs is not realized by the sale, he shall certify the amount of such deficiency, and the names of the persons, with the amounts, who are entitled to recover the same, and the persons by the judgment adjudged to pay the same, and such persons shall be entitled to enforce the same by execution or otherwise, as a judgment of the court. 1899, c. 29, s. 30.

See Ont. Act, sec. 35, and notes thereunder.

**31. Notice of trial.**—The party who obtains an appointment fixing the day and place of trial, shall, at least eight clear days before the day fixed for the trial, serve a notice of trial, which may be in the form L in the schedule, or to the like effect, upon the solicitors for the defendants, who appear by solicitors, and upon all lien-holders known to him, who have registered their liens as required by this chapter, and upon all other persons having any registered charge, or incumbrance or claim on the said lands who are not parties, or who, being parties, appear personally in the said action, and such service shall be personal unless otherwise directed by the court or judge who is to try the action, and the court or judge may, in lieu of personal service, direct in what manner the notice of trial shall be served. 1899, c. 29, s. 31.

See Ont. Act, sec. 36.

**32. Consolidation of actions.**—Where more than one action is brought to realize liens in respect to the same property, the court or judge having power to try such actions may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate all such actions

into one action, and may give the conduct of the consolidated action to any plaintiff in his discretion. 1899, c. 29, s. 32.

See Ont. Act, sec. 37.

**33. Carriage of proceedings.**—Any lien-holder entitled to the benefit of the action may apply for the carriage of the proceedings, and the court or judge having power to try the action may thereupon make an order giving such lien-holder the carriage of the proceedings, and such lien-holder shall, for all purposes in the action, be the plaintiff in the action. 1899, c. 29, s. 33.

See Ont. Act, sec. 38.

**34. Judgment in petty cases final.**—In any action where the total amount of the claims of the plaintiff and other persons claiming liens is one hundred dollars or less, the judgment of the court or judge having power to try such action shall be final, binding, and without appeal, except that upon application, within fourteen days after judgment is pronounced, to the court or judge who tried the same, a new trial may be granted. 1899, c. 29, s. 34.,

See Ont. Act, sec. 39 (1).

**35. Appeal.**—In all actions where the total amount of the claims of the plaintiff and other persons claiming liens is more than one hundred dollars, any party affected thereby may appeal therefrom to the Supreme Court, *en banc*, whose judgment shall be final and binding, and no appeal shall lie therefrom. The Judicature Act and the rules of the Supreme Court shall, so far as the same are applicable, apply to all appeals under this section. 1899, c. 29, s. 35.

See Ont. Act, sec. 39 (2), (3).

**36. Costs.**—The costs of, and incidental to, all actions tried, and all applications and orders made under this chapter, and not



otherwise provided for, shall be in the discretion of the court or judge. 1899, c. 29, s. 36.

The provisions in the Ontario Act respecting costs are contained in sections 41, 42, 43, 44 and 45 of that Act.

**37. Stamp.**—Every statement of claim filed in the city of Halifax in an action to enforce a lien under this chapter shall be accompanied by a fee of fifty cents, which shall be included in the costs, and paid by law library stamp. 1899, c. 29, s. 37.

**38. Deficiency after sale recoverable.**—All judgments in favor of lien-holders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after sale of the property adjudged to be sold, and whenever on a sale of any property to realize a lien under this chapter sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered against the property of such person or persons by the usual process of the court. 1899, c. 29, s. 38.

See Ont. Act, sec. 47.

**39. Certificate vacating lien.**—A certificate vacating a lien may be in one of the forms M or N in the schedule, or to the like effect.

#### MISCELLANEOUS PROVISIONS.

**40. Contracting out.**—No agreement shall be held to deprive any one otherwise entitled to a lien by this chapter, and not a party to the agreement, of the benefit of the lien, but the lien shall attach notwithstanding such agreement. 1899, c. 29, s. 3.

See Ont. Act, sec. 6.

**41. (1) Mechanics' lien on chattels.**—(1) Every mechanic or other person who has bestowed money, or skill and materials upon any chattel or thing in the alteration and improvement in its pro-

perties, or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money, or skill and materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell the chattel or thing in respect to which the lien exists, on giving one week's notice by advertisement in a newspaper published in the county in which the work was done, or in case there is no newspaper published in such county, then in a newspaper circulating therein, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence (if any) of the owner, if he is a resident of such county.

(2) Such mechanic, or other person, shall apply the proceeds of the sale in payment of the amount due to him, and the cost of advertising and sale, and shall, upon application, pay over any surplus to the person entitled thereto. 1899, c. 29, s. 39.

See Ont. Act, sec. 51, and notes thereunder. See also Chapter IV., "Mechanics' Liens upon Personalty," and cases cited, including Nova Scotia cases.

**42. Personal judgment.**—When in any action brought under the provisions of this chapter, any claimant fails, for any reason, to establish a valid lien, he may nevertheless recover therein a personal judgment against the party or parties to the action for such sum or sums of money as appear to be due to him from such party or parties, and which he might recover in an action on the contract against such party or parties. 1899, c. 29, s. 40.

See Ont. Act, sec. 48.

43. The forms in the schedule hereto, or forms similar thereto, or to the like effect, may be adopted in all proceedings under this chapter.

See Ont. Act, sec. 49.

## SCHEDULE.

### FORM A—SECTION 15.

#### CLAIM OF LIEN FOR REGISTRATION.

A. B. (*name of claimant*) of (*here state residence of claimant, and, if so, as assignee of, stating name and residence of assignor*), under the Mechanics' Lien Act, claims a lien upon the estate of (*here state the name and residence of owner of land upon which the lien is claimed*), in the undermentioned land in respect to the following work (*service or materials*), that is to say (*here give a short description of the nature of the work done or materials furnished, and for which the lien is claimed*), which work (*or service*) was (*or is to be*) done (*or materials were furnished*) for (*here state the name and residence of the person upon whose credit the work is done or materials furnished*), on or before the                      day of                      .

The amount claimed as due (*or to become due*) is the sum of \$                      .

The following is a description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

When credit has been given, insert: The said work was done (*or materials were furnished*) on credit, and the period of credit agreed to expired (*or will expire*) on the                      day of                      , 19                      .

Dated at                      this                      day of                      , 19                      .  
(*Signature of Claimant.*)

### FORM B—SECTION 15.

#### CLAIM OF LIEN FOR WAGES FOR REGISTRATION.

A. B. (*name of claimant*) of (*here state the residence of claimant, and, if so, as assignee of, stating name and residence of*

*assignor*), under the Mechanics' Lien Act, claims a lien upon the estate of (*here state the name and residence of the owner of the land upon which the lien is claimed*) in the undermentioned land in respect to            days' work performed thereon while in the employment of (*here state the name and residence of the person upon whose credit the work was done*) on or before the            day of            .

The amount claimed as due is the sum of \$            .

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at            this            day of            , 19            .  
(*Signature of claimant.*)

### FORM C—SECTIONS 15, 16.

#### AFFIDAVIT VERIFYING CLAIM.

I, A. B., named in the above (*or annexed*) claim, make oath and say that the said claim is true.

*Or*, We, A. B., and C. D., named in the above (*or annexed*) claim, make oath and say, and each for himself saith, that the said claim, as far as relates to him, is true.

*Where the affidavit is made by agent or assignee, a clause must be added to the following effect:* I have full knowledge of the facts set forth in the above (*or annexed*) claim.

Sworn before me at  
in the county of  
this            day of  
19            .

*Or*, the said A. B. and C. D. were  
severally sworn before me at  
in the county of  
this            day of            19            .

*Or*, the said A. B. was sworn  
before me at            in  
the county of            this  
day of            , 19            .

## FORM D—SECTION 16.

## CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons under the Mechanics' Lien Act claim a lien upon the estate of *(here state the name and residence of the owner of land upon which the lien is claimed)* in the under-mentioned land, in respect to wages for labor performed thereon while in the employment of *(here state name and residence or names and residences of employers of the several persons claiming the lien)*.

A. B., of *(residence)* \$                      for                      days' wages.

C. D., of *(residence)* \$                      for                      days' wages.

E. F., of *(residence)* \$                      for                      days' wages.

The following is the description of the land to be charged *(here set out a concise description of the land to be charged sufficient for the purpose of registration)*.

Dated at                      this                      day of                      , 19                      .

*(Signature of the several Claimants.)*

---

## FORM E—SECTIONS 21, 22.

## CERTIFICATE OF LIS PENDENS.

*(Style of Court and Cause.)*

I certify that the above named plaintiff has commenced an action in the above court to enforce against the following land *(describing it)* a claim of mechanics' lien for \$                      .

Dated this                      day of                      , 19                      .

*(Prothonotary (or Clerk).)*

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## FORM F—SECTION 28.

## AFFIDAVIT VERIFYING CLAIM ON COMMENCING ACTION.

*(Style of Court and Cause.)*

I,                      , make oath and say that I have read *(or heard read)*, the foregoing claim of lien, and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect to my lien is the



just and true amount due and owing to me after giving credit for all the sums of money, or goods, or merchandise to which (*naming the debtor*) is entitled to credit as against me.

Sworn, etc.

## FORM G—SECTION 28.

### AFFIDAVIT OF LIEN-HOLDER VERIFYING CLAIM.

(Style of Court and Cause.)

I, G. H., of (*address and occupation*), make oath and say:

I have in the foregoing account (*or*, in the account now shown to me, marked A), set forth a just and true account of the amount due and owing to me by E. H. (*the owner*), or by E. F., who is a contractor with the defendant, L. G. (*the owner*), of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise, to which the said E. F. is justly entitled to credit in respect to the said account, and the sum of \$                    appearing by such account to be due to me as the amount (*or balance*) of such account is now justly due and owing to me.

Sworn, etc.

## FORM H—SECTION 29.

## DEFENCE.

(Style of Court and Cause.)

A. B., \_\_\_\_\_, disputes that the plaintiff is now entitled to a mechanics' lien on the following grounds. (*setting forth the grounds shortly*).

- (a) That the lien has not been presented in due time, as required by statute.
- (b) That there is nothing due to the plaintiff.
- (c) That the plaintiff's lien has been vacated and discharged.
- (d) That there is nothing due by (*owner's name*) for the satisfaction of the plaintiff's claim.

Delivered on the \_\_\_\_\_ day of \_\_\_\_\_, by A. B. in person, whose address for service is (*stating address*) or \_\_\_\_\_

Delivered on the \_\_\_\_\_ day of \_\_\_\_\_ by Y. Z., solicitor  
for the said A. B.

NOTE.—*If the owner does not dispute the claim entirely, and only wishes to have the accounts taken, he may use the following form:*

---

FORM I—SECTION 29.

DEFENCE WHERE THERE ARE NO MATTERS DISPUTED, OR WHERE  
THE MATTERS IN DISPUTE ARE MATTERS OF ACCOUNT.

*(Style of Court and Cause.)*

A. B., \_\_\_\_\_, admits that the plaintiff is entitled to a  
lien, and claims that the following is a just and true statement  
of the account in question:

Amount of contract price for work con- tracted to be performed by E. F., as plumber, on the lands in question herein. . . . .	\$500 00
--	----------

Amounts Paid on Account.

June 1st, 1900, paid E. F. . . . .	\$200 00	
June 1st, 1900, paid G. H. and I. K., sub-contractors of E. F. . . . .	100 00	300 00

Balance admitted to be due. . . . .	\$200 00
-------------------------------------	----------

For satisfaction of the lien of plaintiff and other lien-holders  
(*as the case may be*), A. B., before action, tendered to the plain-  
tiff \$ \_\_\_\_\_ in payment of his claim, and now brings into court  
\$ \_\_\_\_\_ and submits that that amount is sufficient to pay the  
plaintiff's claim, and asks that this action be dismissed as against  
him, with costs.

Delivered, etc.

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FORM J—SECTION 29.

AFFIDAVIT OF OWNER VERIFYING ACCOUNT.

*(Style of Court and Cause.)*

I, A. B., of \_\_\_\_\_, being the owner of the lands in ques-  
tion in this action, make oath and say: That the account set forth

in the foregoing defence is a just and true account of the amount of the contract price agreed to be paid by me to E. F., for the work contracted to be done by him on the lands in question.

The said account also justly and truly sets forth the payments made by me on account thereof, and the person or persons to whom the same were made; and the balance of two hundred dollars appearing by such account to be still due and payable is the just and true sum now due and owing by me in respect to my contract with the said E. F.

Sworn, etc.

### FORM K—SECTION 30.

#### JUDGMENT.

In the	Court. }	
	S.S. }	
	Between {	....., <i>Plaintiff</i> .
		and
		....., <i>Defendant</i> .

This action coming on for trial before \_\_\_\_\_ in \_\_\_\_\_ at \_\_\_\_\_ upon opening of the matter and it appearing that the following persons have been duly served with notice of trial herein (*set out the names of all persons served with notice of trial*), and all such persons (*or as the case may be*) appearing at the trial (*if so*), and the following persons not having appeared (*set out the names of non-appearing persons*), and upon hearing the evidence adduced and what was alleged by counsel for the plaintiff and for C. D. and for E. F. and the defendant (*if so*) (and by A. C. appearing in person).

1. This court doth declare that the plaintiff and the several persons mentioned in the first schedule hereto are respectively entitled to a lien under "The Mechanics' Lien Act," upon the lands described in the second schedule hereto, for the amounts set opposite their respective names in the first, second and third columns of the first schedule, and the persons primarily liable for such claims respectively are set forth in the fourth column of the third schedule.

2. (*If so*.) And this court doth further declare that the several persons mentioned in the third schedule hereto are also entitled to some lien, charge or incumbrance upon the said lands

for the amounts set opposite their respective names in the fourth column of the third schedule.

3. And this court doth further order and adjudge that upon the defendant (*A. B., the owner*) paying into court to the credit of this action the sum of \$ (gross amount of liens in the first and third schedules for which the owner is liable) on or before the day of next, that the said liens in the said first schedule mentioned be and the same are hereby discharged (and the several persons in the third schedule mentioned shall release and discharge their said claims and assign and convey the said premises to the defendant (*owner*) and deliver up all documents on oath to the said defendant (*owner*) or to such person as he appoints, and the said moneys so paid into court shall be paid out in payment of the claims of the said lien-holders (*if so*) and incumbrancers).

4. But if the said defendant (*owner*) makes default in payment of the said moneys into court as aforesaid, this court doth order and adjudge that the said lands be sold with the approbation of of this court at , and that the purchase money be paid into court to the credit of this action, and all proper parties do join in the conveyances as the said . . . . . directs.

5. And this court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in the said first (*and third*) schedule(s), mentioned as the said directs, with subsequent interest and subsequent costs to be computed and taxed.

6. And this court doth further order and adjudge that if the purchase money is insufficient to pay in full the claims of the several persons mentioned in the first schedule, the persons primarily liable for such claims as shown in such schedule do pay to the persons to whom they are respectively primarily liable the amounts remaining due to such persons forthwith after the same have been ascertained by the said .

7. (*If so*), and this court doth declare that have not proved any lien under the Mechanics' Lien Act, and that they are not entitled to any such lien, and this court doth order and adjudge that the claims of lien respectively registered by them against the lands mentioned in the second schedule be and the same are hereby discharged.

Dated at this day of , 19 .

## SCHEDULE 1.

Names of lien holders entitled to Mechanics' Lien.	Amount of debt and interest (if any).	Costs.	Total	Names of primary debtors.

## SCHEDULE 2.

The lands in question in this matter are (*set out description sufficient for registration purposes*).

## SCHEDULE 3.

Names of persons entitled to incumbrances other than Mechanics' Liens.	Amount of debt and interest, (if any).	Costs.	Total.



## FORM L—SECTION 31.

## NOTICE OF TRIAL.

*(Style of Court and Cause.)*

Take notice that this action will be tried at the court house at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ by \_\_\_\_\_ and at such time and place the \_\_\_\_\_ will proceed to try the action and all questions which arise in or which are necessary to be tried to completely dispose of the action, and to adjust the rights and liabilities of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all enquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions, and accounts arising in such action, and will give all necessary relief to all parties.

And further take notice, that if you do not appear at the trial and prove your claim, if any, or prove your defence, if any, to the action, the proceedings will be taken in your absence, and you may be deprived of all benefit of the proceedings, and your rights disposed of in your absence.

This is a mechanics' lien action brought by the above named plaintiff against the above named defendants to enforce a mechanic's lien against the following lands. (*set out description of lands*).

This notice is served by, etc.

## FORM M—SECTION 39.

## CERTIFICATE VACATING LIEN.

*(Style of Court and Cause.)*

I certify that the defendant, A. B. (*the owner*) has under an order made herein by \_\_\_\_\_, and dated the \_\_\_\_\_ day of \_\_\_\_\_, paid into court to the credit of this cause all money due and payable by him for the satisfaction of the liens of the plaintiff and E. F., G. H., I. J., and K. L., and their liens are hereby vacated and discharged so far as the same affect the following lands: (*describe lands*).

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_.  
(*Prothonotary (or Clerk.)*)

## FORM N—SECTION 39.

## CERTIFICATE VACATING LIEN.

*(Style of Court and Cause.)*

I certify that I have enquired and find that the plaintiff is not entitled to any mechanics' lien upon the lands of the defendant A. B. (*the owner*), and that his claim of lien is hereby vacated and discharged so far as the same affects the following lands: (*describe lands*).

Dated at                      this                      day of                      , 19                      .  
Referee.

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## CHAPTER 31.

AN ACT TO AMEND CHAPTER 171, REVISED STATUTES, 1900,  
"THE MECHANICS' LIEN ACT."

(Passed the 7th day of April, A.D. 1905.)

## SECTION.

1. Chapter 171 added to.
- (1.) Lien on mining property for labor.
- (2.) Priority of lien.
- (3.) Registration of lien not necessary to describe property.

## SECTION.

- (4.) Lien when registered.
- (5.) Proceedings when commenced.
- (6.) Interpretation.

Be it enacted by the Governor, Council, and Assembly, as follows:—

1. Chapter 171 added to.—Chapter 171 of the Revised Statutes, 1900, "The Mechanics' Lien Act," is amended by adding thereto after sec. 13 the following section:

13A. (1) **Lien on mining property for labor.**—Every laborer or workman to whom wages is due by any person, firm or corporation for work or labor performed at a mine or in connection with mining operations carried on by such person, firm or corporation shall have a lien upon the property and mining leases or licenses in respect to which such work and labor has been performed to the extent of two months' wages.

(2) **Priority of lien.**—Such lien shall have priority over all other liens, mortgages or charges upon the said property and mining leases or licenses whether the same are prior or subsequent to, the performing of such work and labor.

(3) **Registration of lien not necessary to describe property.**—In the registration of such lien it shall not be necessary to describe the property and mining leases affected thereby, but

it shall be sufficient to designate such property and mining leases as the property and mining leases of such person or corporation.

(4) **Lien when registered.**—Such lien shall be registered in the office of the Commissioner of Public Works and Mines at Halifax, as well as at the registry of deeds, of the registration district in which the mine is situate, and the provisions of “The Mechanics’ Lien Act” shall, in so far as the same are applicable, apply to registration in the office of said commissioner.

(5) **Proceedings when commenced.**—Proceedings to enforce a lien created by this section may be taken at any time within six months from the registration thereof and shall be deemed to be taken on behalf of all persons holding such liens at the time such proceedings are commenced or within thirty days thereafter.

(6) **Interpretation.**—In this section the expression “mine,” means a mine to which the Coal Mines Regulation Act or the Metalliferous Mines Regulation Act applies and the expression “mining” shall have the same meaning as the expression “to mine” in the Mines Act.

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## REVISED STATUTES OF NEW BRUNSWICK, 1903.

## CHAPTER 147.

## RESPECTING MECHANICS' LIEN.

1. **Short title.**—This chapter may be cited as “The Mechanics’ Lien Act.” 57 V. c. 23, s. 1.

2. **Interpretation.**—Wherever the following words occur in this chapter or in the schedule thereto, they shall be construed in the manner hereinafter mentioned unless a contrary intention appears:

(1) **“Contractor.”**—“Contractor” shall mean a person contracting with or employed directly by the owner for the doing of work, or placing or furnishing of machinery or materials for any of the purposes mentioned in this chapter.

(2) **“Sub-contractor.”**—“Sub-contractor” shall mean a person not contracting with or employed directly by the owner for the purposes aforesaid, but contracting with or employed by the “contractor” or under him by a “sub-contractor.”

(3) **“Owner.”**—“Owner” shall extend to and include a person having any estate or interest in the lands upon or in respect of which the work is done or materials or machinery are placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done, or materials or machinery placed or furnished, and all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials or machinery furnished have been commenced to be furnished.

(4) **“Wage-earner.”**—“Wage-earner” shall mean any person performing labor for wages, by the day, week or month as the case may be, and not by the job.



(5) **“County Court.”**—“County Court” in this chapter shall mean the County Court of the county in which the lands sought to be affected by the lien are situate.

(6) **“Judge.”**—“Judge” shall mean the judge of the County Court of the county in which the lands sought to be affected by the lien are situate, or the judge of a County Court before whom proceedings may be taken in case of the said judge being interested or related to any of the parties.

(7) **“Registrar.”**—“Registrar” shall mean the registrar of deeds of the county where the lands sought to be affected by the lien are situate.

(8) **“Registered.”**—“Registered” shall mean filed in the office of the registrar of deeds of the county where the lands sought to be affected by the lien are situate. 57 V. c. 23, s. 2.

See Ontario Act, sec. 2. The Ontario Act includes a municipal corporation and a railway company under the definition of “owner.”

**3. Agreement not to affect lien of person not a party thereto.**—No agreement shall be held to deprive anyone otherwise entitled to a lien under this chapter, and not a party to the agreement, of the benefit of the lien, but the lien shall attach notwithstanding such agreement. 57 V. c. 23, s. 3.

See Ont. Act, sec. 6.

**4. Lien of mechanic, builder, laborer, contractor, etc., for work, materials, etc.**—Unless he signs an express agreement to the contrary, every mechanic, machinist, builder, laborer, contractor or other person doing work upon or furnishing materials to be used in the construction, alteration or repair of any building or erection, or erecting, furnishing or placing machinery of any kind in, upon or in connection with any building, erection or mine, shall, by virtue of being so employed or furnishing, have a lien for the price of the work, machinery or materials upon

the building, erection or mine and the lands occupied thereby or connected therewith. 57 V. c. 23, s. 4.

See Ont. Act, sec. 4, and cases cited thereunder. A number of things mentioned in the Ontario Act as subject to the lien are not specified in this section, but at least some of these would probably be held to be covered by the words, "building, erection or mine, and the lands occupied thereby or connected therewith." As to what constitutes a building or erection, see a large number of cases cited in *Adamson v. Rogers*, (1895) 22 A.R. 415.

**5. Lien to attach to building, etc.**—The lien shall attach upon the estate and interest of the owner, as defined by this chapter, in the building, erection or mine upon or in respect of which the work is done or the materials or machinery placed or furnished, and the land occupied thereby or connected therewith. 57 V. c. 23, s. 5.

See Ont. Act, sec. 7.

**6. (1) Lien for thirty days' wages.**—Every wage-earner who performs labor for wages upon the construction, alteration or repairs of any building or erection, or in erecting or placing machinery of any kind in, upon, or in connection with any building, erection or mine, shall, to the extent of the interest of the owner, have, upon the building, erection or mine, and the land occupied thereby or connected therewith, a lien for such wages, not exceeding the wages for thirty days, or a balance equal to his wages for thirty days.

**(2) Lien for wages on property of wife.**—The lien for wages mentioned in this section shall attach, when the labor is in respect of a building, erection or mine on property belonging to the wife of the person at whose instance the work is done, upon the estate or interest of the wife in such property as well as upon that of her husband.

**(3) Device to defeat lien for wages to be void.**—Every device by an owner or contractor which shall be adopted in order to

defeat the lien of wage-earners under this chapter, shall, as respects such wage-earners, be null and void. 57 V. c. 23, s. 6.

See Ont. Act, sec. 14.

**7. Reservation of percentage of price on completion of contract.**

—The owner shall, in the absence of a stipulation to the contrary, be entitled to retain, for a period of thirty days after the completion of the contract—

(a) Fifteen per centum of the price to be paid to the contractor when such price does not exceed \$1,000.

(b) Twelve and a half per centum of the price to be paid to the contractor when such price is more than \$1,000, but does not exceed \$5,000; and

(c) In all other cases, ten per centum of the price to be paid to the contractor. 57 V. c. 23, s. 7.

See Ont. Act, sec. 11.

**8. Limit to lien of sub-contractor.**—In case the lien is claimed by a sub-contractor, the amount which may be claimed in respect thereof shall be limited to the amount payable to the contractor or sub-contractor (as the case may be) for whom the work has been done, or the materials or machinery have been furnished or placed. 57 V. c. 23, s. 8.

See Ont. Act, sec. 10.

**9. (1) Pro tanto discharge of lien by payments up to 90 per cent. of price made in good faith before notice of lien.**—All payments up to ninety per centum of the price to be paid for the work, machinery or materials, as defined by sec. 4 of this chapter, made in good faith by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing by the person claiming the lien has been given to such owner, contractor or sub-contractor (as the case may be) of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this

chapter, but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this chapter.

(2) **Lien on 10 per cent. of price for ten days after completion of work, etc., where no notice of lien given.**—A lien shall, in addition to all other rights or remedies given by this chapter, also operate as a charge to the extent of ten per centum of the price to be paid by the owner for the work, machinery or materials as defined by sec. 4 of this chapter, up to ten days after the completion of the work or of the delivery of the materials in respect of which such lien exists, and no longer, unless such notice in writing be given as herein provided.

(3) **Priority of lien for wages on 10 per cent. of price to contractor.**—A lien for wages for thirty days or for a balance equal to the wages for thirty days, shall, to the extent of the said ten per centum of the price to be paid to the contractor, have priority over all other liens under this chapter, and over any claim by the owner against the contractor for or in consequence of the failure of the latter to complete his contract.

(4) **Increase of percentage where price does not exceed \$1,000 or where price between \$1,000 and \$5,000.**—When the total price to be paid or contracted or agreed to be paid for the whole of the work, machinery or materials, as defined by section 4 of this chapter does not exceed \$1,000, the three preceding sub-sections of this section shall be read as if the word “ninety” was omitted therefrom, and the word “eighty-five” inserted in lieu thereof, and if the word “ten” was omitted therefrom and the word “fifteen” inserted in lieu thereof; and where the said total price exceeds \$1,000, but does not exceed \$5,000, the said first three sub-sections shall be read as if the word “ninety” was omitted therefrom and the word “eighty-seven and a half” inserted in lieu thereof, and as if the word “ten” was omitted therefrom and the words “twelve and a half” inserted in lieu thereof. 57 V. c. 23, s. 9.

See Ont. Act, sec. 11 (2).

**10. Owner not liable to sum greater than sum payable to contractor.**—Save as herein provided the lien shall not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor. 57 V. c. 23, s. 10.

See Ont. Act, sec. 9.

**11. Lien for material or labor supplied to person having lien.**—All persons furnishing material to or doing labor for the person having a lien under this chapter, in respect of the subject of such lien, who notified the owner of the premises sought to be affected thereby, within thirty days after such materials furnished or labor performed, of any unpaid account or demand against such lien-holder for such material or labor, shall be entitled, subject to the provisions of secs. 6 and 9, to a charge therefor *pro rata* upon any amount payable by such owner under said lien, and if the owner thereupon pays the amount of such charge to the person furnishing material or doing labor as aforesaid, such payment shall be deemed a satisfaction *pro tanto* of such lien. 57 V. c. 23, s. 11.

See Ont. Act, sec. 12.

**12. Trial where dispute as to claim under preceding section.**—In case of a dispute as to the validity or amount of an unpaid account or demand, of which notice is given to the owner under the preceding section, the same shall be first determined by action in the proper court in that behalf; and pending the proceedings to determine the dispute, so much of the amount of the lien as is in question therein may be withheld from the person claiming the lien, or the judge may order such amount paid into a bank to the credit of the cause. 57 V. c. 23, s. 12.

**13. Payment of judgment or claim by owner where failure by primary debtor to pay.**—In case the person primarily liable to the person giving such notice as mentioned in sec. 11, fails to pay the amount for which judgment is recovered within ten



days after the judgment is obtained, the owner, contractor or sub-contractor may pay the amount out of any moneys due by him to the person primarily liable as aforesaid, on account of the work done, or materials or machinery furnished or placed in respect of which the debt arose; and such payment if made after the judgment as aforesaid (or if made without any action being previously brought or dispute existing, then, if the debt in fact existed, and to the extent thereof) shall operate as a discharge *pro tanto* of the moneys so due as aforesaid to the person primarily liable. 57 V. c. 23, s. 13.

**14. Property not to be removed while subject to lien.**—During the continuance of a lien, no portion of the property or machinery affected thereby shall be removed to the prejudice of the lien; and any attempt at such removal may be restrained by application to the judge. Disobedience of the judge's order restraining such removal shall be punishable by attachment for contempt by the judge as in the Supreme Court for disobedience of an order of a judge of that court. 57 V. c. 23, s. 14.

See Ont. Act, sec. 16.

**15. (1) Registration of claim of lien.**—A claim of lien applicable to the case may be registered in the office of the registrar, and shall state:

(a) The name and residence of the claimant and of the owner of the property to be charged, and of the person for whom and upon whose credit the work is done or materials or machinery furnished, and the time or period (if any time is specified in the contract) within which the same was or was to be done or furnished;

(b) The work done or materials or machinery furnished;

(c) The sum claimed;

(d) The description of the land to be charged;

(e) The date of expiry of the period of credit agreed to by

the lien-holder for payment for his work, materials or machinery, where credit has been given.

(2) **Form of claim of lien for registration.**—The claim may be in one of the forms (1), (2), and (3) given in the schedule to this chapter, and shall be verified by the affidavit of the claimant, or his agent or assignee having full knowledge of the matters required to be verified, and the affidavit of an agent or assignee shall state that he has such knowledge. 57 V. c. 23, s. 15.

See Ont. Act, sec. 17.

16. **Joinder of claims for wages.**—A claim for wages may include the claims of any number of wage-earners who may choose to unite therein. In such case each claimant shall verify his claim by his affidavit, but need not repeat the facts set out in the claim; and an affidavit substantially in accordance with form (4) of this chapter shall be sufficient. 57 V. c. 23, s. 16.

See Ont. Act, sec. 18.

17. (1) **Duty of registrar to register claim of lien.**—The registrar, upon payment of his fees, shall register the claim so that the same may appear as an incumbrance against the land therein described, and the day, hour and minute when the same was registered shall appear upon the registry.

(2) **Fee to registrar.**—The fee for registration shall be twenty-five cents; if several parties join in one claim the registrar shall have a further fee of ten cents for every person after the first.

(3) **Claim to be entered in mechanics' lien book.**—The registrar shall not be bound to copy in any registry book any claim or affidavit, but he shall enter each claim in a book to be kept for that purpose, to be called "The Mechanics' Lien Book," and shall insert therein particulars of the claim, with a description of the property against which the lien is sought. 57 V. c. 23, s. 17.

See Ont. Act, sec. 20.

**18. Effect of registration of claim of lien.** —Where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of The Registry Act, chapter 151 of these Consolidated Statutes, but except as herein otherwise provided, The Registry Act shall not apply to any lien arising under this chapter. 57 V. c. 23, s. 18.

See Ont. Act, sec. 21.

**19. (1) When claim of lien for wages may be registered.**—Where the lien is for wages under sections 6 or 9, the claim may be registered at any time within thirty days after the last day's labor for which the wages are payable.

(2) Such lien shall not be entitled to the benefit of the provisions of sections 6 and 9, after the said period, unless the same is duly registered before the expiration of the said period so limited.

(3) **Priority of lien for wages.**—Such lien shall have the same priority for all purposes after as before registration. 57 V. c. 23, s. 19.

See Ont. Act, sec. 22.

**20. Where other claims of lien may be registered.**— In other cases the claim of lien may be registered before the commencement or during the progress of the work, or within thirty days from the completion thereof, or from the supplying or placing of the machinery. 57 V. c. 23, s. 20.

See Ont. Act, sec. 22.

**21. Effect of failure to register lien within limited time.**—Every lien which has not been duly registered under the provisions of this chapter, shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime proceedings are instituted and are being prosecuted without delay to realize the claim under

the provisions of this chapter, and a certificate of the pending of such proceedings (which may be granted by the judge), is duly registered. 57 V. c. 23, s. 21.

See Ont. Act, sec. 23.

**22. (1) Within what time after registration of lien proceedings to realize claim to be instituted, etc.**—Every lien which has been duly registered under the provisions of this chapter shall absolutely cease to exist after the expiration of ninety days after the work has been completed, or materials or machinery furnished, or wages earned, or the expiry of the period of credit, where such period is mentioned in the claim of lien filed, unless in the meantime proceedings are instituted and are being prosecuted without delay to realize the claim under the provisions of this chapter, and a certificate of such proceedings (which may be granted by the judge) is duly registered.

**(2) Renewal of registration where proceedings not instituted.**—The registration of a lien under this chapter shall cease to have any effect at the expiration of six months from the registration thereof, unless the lien shall be again registered within the same period, except in the meantime proceedings have been instituted to realize the claim and are being prosecuted without delay, and a certificate of the pendency of such proceedings as aforesaid has been duly registered as provided in the preceding sub-section. 57 V. c. 23, s. 22.

See Ont. Act, sec. 24.

**23. Effect of failure to institute proceedings within 90 days after completion of work, etc., where no period of credit.**—If there is no period of credit, or if the date of the expiry of the period of credit is not dated in the claim so filed, the lien shall cease to exist upon the expiration of ninety days after the work has been completed or materials or machinery furnished, unless in the meantime proceedings have been instituted pursuant to

sec. 22 of this chapter and are being prosecuted without delay, and a certificate of the pendency of such proceedings as aforesaid has been duly registered as provided in sec. 22. 57 V. c. 25, s. 23.

See Ont. Act, sec. 25.

**24. Death of lien-holder.—Assignment of right.**—In the event of the death of a lien-holder his right of lien shall pass to his personal representatives, and the right of a lien-holder may be assigned by an instrument in writing. 57 V. c. 23, s. 24.

See Ont. Act, sec. 26.

**25. Discharge of lien.**—A lien may be discharged by a receipt signed by the claimant or his agent, duly authorized in writing, acknowledging payment and verified by affidavit, and filed in the office of the registrar; such receipt shall be numbered and entered by the registrar in the mechanics' lien book. The fees shall be the same as for registering a claim for lien. 57 V. c. 23, s. 25.

See Ont. Act, sec. 27.

**26. Contractor to bear cost of registering discharge of lien.**—When there is a contract for the execution of the work as hereinbefore mentioned, the registration of all discharges of liens shall be at the cost of the contractor unless the judge otherwise orders. 57 V. c. 23, s. 26.

**27. (1) Vacating registry on payment into court.**—Upon application to the judge, he may receive security or payment into court in lieu of the amount claimed, and may thereupon vacate the registry of the lien.

(2) The judge may annul the said registry upon any other ground. 57 V. c. 23, s. 27.

See Ont. Act, sec. 27.



**28. (1) Lien for work, etc., on chattels.—Sale of chattel.**—Every mechanic or other person who has bestowed money or skill or materials upon any chattel or thing in the alteration and improvement in its properties, or which imparts an additional value to it, so as thereby to be entitled by law to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell the chattel or thing in respect of which the lien exists, on giving one week's notice by advertisement by posters put up in three or more public places adjacent to the place of sale, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale (which shall be a public place), and the name of the auctioneer, and leaving a notice in writing two weeks prior to the sale at the last or known place of residence (if any) of the owner, if he be a resident of such county.

**(2) Application of proceeds of sale.**—Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the cost of advertising and sale, and shall, upon application, pay over any surplus to the person entitled thereto. 57 V. c. 23, s. 28.

See Ont. Act, sec. 51. See also Chapter IV., “Mechanics’ Liens upon Personalty,” *ante*.

**29. Voluntary payment by owner to mechanics, etc., to be deemed a payment to contractor.**—In case an owner chooses to make payments to the mechanics, laborers, or other persons referred to in section 4 of this chapter, for on account of, but not exceeding, the amount of the just debts due to them for work done or materials or machinery placed or furnished as therein mentioned, without the proceedings mentioned in section 12, and shall within three days afterwards give, by letter or otherwise,

written notice of such payment to the contractor or his agent, such payment shall, as between the owner and the contractor, be deemed to be a payment to the contractor, on the contract generally, but not so as to affect the percentage to be retained by the owner as provided by sections 7 and 9. 57 V. c. 23, s. 29.

**30. (1) Declaration by contractor.—Form of declaration.**—Before the contractor for any work shall be entitled to receive a payment on his contract, it shall be his duty to produce to and leave with the owner or his agent an affidavit or a statutory declaration by the contractor (or his agent, competent from personal knowledge to speak to the facts), stating that all persons, who up to that time have been employed on the work and entitled to wages, have been paid in full up to and inclusive of the fourteenth day previous to such payment being made by the owner to the contractor. The said affidavit or statutory declaration may be to the effect set forth in forms (5) and (6) in the schedule to this chapter.

**(2) Deduction from amount due contractor.**—Or if it is admitted, or otherwise appears that any wages are unpaid, the contractor shall not be entitled to receive the amount otherwise payable to him without there being deducted therefrom an amount sufficient to cover what is so unpaid to such wage-earners.

**(3) Protection of owner making payment under declaration of contractor.**—The said affidavit or statutory declaration shall be conclusive evidence in favor of the owner making the payment; unless at or before making the payment he had actual and express notice of the wages not having been paid.

**(4) Effect of payment made without declaration.**—Any payment made on the contract without the owner having received such affidavit, or statutory declaration, or with actual and express notice of unpaid wages, shall not be a valid payment as against persons whose wages are unpaid at the time of the payment on the contract.

(5) **Cases in which declaration not required.**—The affidavit or statutory declaration aforesaid shall not be necessary when the architect's estimate for the month, in case the contract provides for such estimate, does not exceed \$100, or when the payment made in good faith in respect of the progress of the work for the month (in case the contract does not provide for estimates) does not exceed \$100.

**31. Lien of wage-earners not to be defeated by garnishment, execution, etc.**—The lien of wage-earners for thirty days' wages, or for a balance equal to thirty days' wages, provided for by sections 6 and 9, shall not be defeated or impaired by any garnishment had subsequently to the contract, or by any execution subsequently issued, or by reason of the work contracted for being unfinished, or of the price, for that or any other reason, not being payable to the contractor. 57 V. c. 23, s. 31.

**32. (1) Calculation of percentage where contract not completed.**—In case of the contract not having been completely fulfilled when lien is claimed by wage-earners, the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor.

(2) **Lien on unfinished building.**—Every wage-earner shall be entitled to enforce a lien in respect of an unfinished building to the same extent as if the building were finished.

(3) **Percentage not to be applied in completion of work by owner.**—The percentage as aforesaid shall not, as against wage-earners, be applied to the completion of the work by the owner when the contractor makes default in completing the same, nor to the payment of damages for the non-completion thereof by the contractor. 57 V. c. 23, s. 32.

**33. Priority of claims of mechanics, etc., to advances under mortgage during progress of work.**—When a mortgage is given to secure an intended loan of money, which money is to be paid

thereafter according or with reference to the progress of work done, or materials or machinery placed or furnished as aforesaid, on the land mortgaged, no advance thereafter made by the mortgagee shall have priority over the claims of mechanics, laborers or other persons referred to in section 4 of this chapter as aforesaid, if the mortgagee at or before the time of such advance has actual and express notice that there are any such claims as aforesaid unpaid; nor unless at the time of such advance he shall require and receive from the mortgagor or his contractor an affidavit or statutory declaration, stating that all such persons as aforesaid have been paid in full up to the time of the advance. The said affidavit or statutory declaration may be to the effect set forth in form (7) in the schedule to this chapter. 57 V. c. 23, s. 33.

**34. Priority of claims of mechanics, etc., over purchaser or mortgagee of unfinished building.**—In case of the sale or mortgage of an unfinished house or building, if its being an unfinished house or building is such as to be apparent to an ordinary observer, the purchaser, before paying his purchase money, or giving a mortgage or other value or security for any balance of such purchase money, or the mortgagee before advancing any money on the security of a mortgage or otherwise, shall require from the vendor (in the case of a sale, or from the mortgagor in the case of a mortgage) a similar affidavit or statutory declaration of the payment of all claims as is provided for in section 33 of this chapter, and the purchaser or mortgagee shall not be entitled to priority in respect to such claims, if at or before the time aforesaid he had actual and express notice that there were such claims as aforesaid unpaid; nor unless he shall have received such affidavit or statutory declaration aforesaid. 57 V. c. 23, s. 34.

**35. Where purchase money for land unpaid, vendor to be deemed a mortgagee, etc.**—In cases where there is an agreement



for the purchase of land, and the purchase money, or part thereof, is unpaid, and no conveyance is made to the purchaser, the purchaser shall for the purposes of this chapter, and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee. 57 V. c. 23, s. 35.

**36. Effect of proceedings to enforce a lien on rights of mortgagee.** When any proceeding is taken to enforce a lien under this chapter, in case a mortgagee of the land is served with a written notice of such proceeding being had, he shall thereafter be entitled to attend the proceedings; and in case of being so served, he shall not thereafter, without the leave hereinafter mentioned, take any proceedings for sale or foreclosure, nor proceed to exercise any power of sale until the proceedings to enforce the lien have terminated; but he may without leave serve any notices required to be served in order to the due exercise of the power. The leave aforesaid may be granted by the judge, and shall only be granted by consent, or (if without consent) on a reasonable consideration of all the circumstances in view of what would be just to both parties. 57 V. c. 23, s. 36,

**37. Address for service with claim of lien.**—Every claim of lien shall give an address, at which all notices and papers may be served, and service of any notice or paper may be effected by sending the same by registered letter to the address so given. 57 V. c. 23, s. 37.

**38. Enforcement of lien.**—Any person claiming a lien under this chapter may enforce the same by means of the proceedings hereinafter set forth. 57 V. c. 23, s. 38.

**39. Statement of claim.**—No writ of summons shall be necessary, but the claimant may file a statement of claim with the judge. 57 V. c. 23, s. 39.

See Ont. Act, sec. 31 (2).



**40. Affidavit with statement of claim. Certificate by judge.**—Such statement of claim shall be verified by affidavit, Form (8); upon the filing of such statement of claim and affidavit the judge shall issue a certificate in duplicate. 57 V. c. 23, s. 40.

See Ont. Act, sec. 31 (2).

**41. Registration of certificate.**—Upon the registration of such certificate in the office of the registrar, the action shall be deemed to have been commenced as against the owner and all other parties against whom the lien is claimed. 57 V. c. 23, s. 41.

See Ont. Act, sec. 31 (2).

**42. Appointment of time and place for hearing claim. Form of certificate and appointment.**—The judge shall also in and by such certificate appoint a time and place at which he will inquire into the claim of the plaintiff and take all necessary accounts; such certificate and appointment shall be issued in duplicate, and may be in the Form (9) set forth in the schedule hereto. 57 V. c. 23, s. 42.

See Ont. Act, sec. 35.

**43. Service of certificate and appointment.**—A copy of such certificate and appointment shall be served on the owner and all other proper parties, at least fifteen days before the day therein named for taking the first proceedings thereunder. 57 V. c. 23, s. 43.

See Ont. Act, sec. 36.

**44. Notice disputing claim.**—Within ten days after the services of such certificate and appointment any person served therewith may file with the judge a notice in the Form (10) in the schedule hereto disputing the plaintiff's right to a lien. 57 V. c. 23, s. 44.

See Ont. Act, sec. 36.

**45. Hearing of dispute as to claim, and certificate of finding.—**

In case a notice disputing the plaintiff's lien is filed, the judge shall, before taking any further proceedings, determine the question raised by the notice, and if so required by any of the parties, may thereupon issue a certificate of his finding. 57 V. c. 23, s. 45.

**46. Note instead of certificate of finding.—**But if not required to issue such last named certificate, it shall suffice for the judge to enter in his book a note of his findings. 57 V. c. 23, s. 46.

**47. Verified statement of account by owner where proceedings by sub-contractor.—**Where no notice disputing the plaintiff's lien is filed as aforesaid, and the proceedings are instituted by a sub-contractor, the owner shall file with the judge a statement of account, Form (11), verified by affidavit, Form (12), showing what, if anything, he admits to be due for the satisfaction of the plaintiff's lien and all other liens of the same class as plaintiffs; such statement shall be filed at least eight days before the day named in the certificate mentioned in section 42 for taking accounts, and in case the owner shall not file such statement, or shall file an untrue statement, he may be ordered by the judge to pay all costs incurred in establishing the true amount due and owing from him. 57 V. c. 23, s. 47.

**48. Verified statements of account by lien-holders.—**All lien-holders of the same class served with the appointment, or who may claim to be entitled to the benefit of the action, shall also within six days from the day named in the appointment for taking accounts, or within such further time as the judge may allow, file with the judge a statement of account, showing the just and true sum due to them respectively after giving credit for all sums in cash, merchandise, or otherwise, to which the debtor is entitled to credit on account of their respective claims, which account shall be verified by affidavit, and such account

and affidavit may be in the Forms (13) and (14) set out in the schedule hereto. 57 V. c. 23, s. 48.

**49. Application by lien-holder to prove claim where claim not filed within limited time.**—A lien-holder who has registered his lien, but has not filed his claim with the judge within the time limited by the next preceding section, may apply to the judge to be let in to prove his claim at any time before the amount realized by the proceedings for the satisfaction of liens has been distributed, and such application may be granted or refused, and upon such terms as to costs or otherwise as may appear just. 57 V. c. 23, s. 49.

See Ont. Act, sec. 35 (4).

**50. Hearing and proceedings on taking accounts.**—Directions to owner to pay money into bank.—Upon the return of the appointment to take accounts, the judge shall proceed to take an account of what is due from the owner and also what is due to the respective lien-holders who have duly filed their claims and shall also tax to them respectively such costs as he may find them entitled to, and shall settle their priorities, and shall make all other inquiries, and take all necessary accounts for the adjustment of the rights of the various parties, and shall thereupon make a report of the result of such inquiries and accounts and shall direct that the money found due by the owner shall be paid into a bank to the credit of the action at the expiration of one month from the date of the report. 57 V. c. 23, s. 50.

See Ont. Act, sec. 35.

**51. Costs where dispute as to amount due by owner.**—In case any dispute arises as to the amount due by the owner for the satisfaction of liens under this chapter, or as to the amount claimed to be due to any other lien-holders, the costs occasioned by the dispute shall be in the discretion of the judge, and shall be borne and paid as he directs. 57 V. c. 23, s. 51.

See Ont. Act, secs. 41, 42, 43, 44, and 45, as to costs.

**52. Order and certificate where finding in favor of owner.**—If nothing is found due by the owner, the judge may make an order staying all further proceedings, and make such order as to costs as may be just, and at the expiration of fourteen days thereafter may grant a certificate vacating the lien of the plaintiff, and all other liens of the same class as the plaintiffs. 57 V. c. 23, s. 52.

See Ont. Act, secs. 41, 42, 43, 44, and 45, as to costs.

**53. Certificate vacating lien where payment by owner into bank to credit of action.**—Where anything is found due by the owner he may on, or at any time before the day appointed for payment, pay the amount found to be due by him into a bank named by the judge to the credit of the action, and thereupon, upon proof of such payment, the judge may grant *ex parte* a certificate in Form (16) in the schedule to this chapter, vacating the lien of the plaintiff, and all other liens of the same class as plaintiffs. 57 V. c. 23, s. 53.

**54. Costs on certificate vacating lien.**—The judge may make such order as to the owner's costs of obtaining and registering any certificate vacating the lien as may be just. 57 V. c. 23, s. 54.

See Ont. Act, secs. 41, 42, 43, 44, and 45, as to costs.

**55. Effect of registration of certificate vacating lien.**—Upon the registration of a certificate vacating any lien or liens, the same shall thereupon be vacated and discharged. 57 V. c. 23, s. 55.

See Ont. Act, sec. 27.

**56. Payment out of bank.**—Upon payment into a bank of the amount which may be found due by the owner, the same shall be (subject to the payment of any costs thereout, as may be ordered), be paid out to the parties found entitled thereto by the report of the judge, 57 V. c. 23, s. 56.

**57. Judgment for sale of land on default of payment by owner.** In default of payment by the owner within the time directed by the report, the plaintiff may apply to the said judge, who, upon due proof of the default, may grant an order or judgment for the sale of the land in question for the satisfaction of the lien of the plaintiff, and other liens of the same class. 57 V. c. 23, s. 57.

See Ont. Act, sec. 35.

**58. Form of judgment for sale.**— The judgment for sale may be in Form (15), set forth in the schedule to this chapter. 57 V. c. 23, s. 58.

**59. Judgment to be entered with clerk of County Court.**— Such judgment for sale shall be entered as other judgments are required to be entered in the office of the clerk of the County Court, and shall have the same force or effect as a judgment in the ordinary case of an action between the said parties. 57 V. c. 23, s. 59.

See Ont. Act, sec. 35.

**60. Sale by sheriff.**—The sale under said judgment shall be conducted by the sheriff who shall execute a deed to the purchaser, the proceedings on such sale shall be in the manner prescribed by statute respecting sales of land made under writs of *feri facias*. 57 V. c. 23, s. 60.

**61. Report of sale by sheriff.**—After the sale the sheriff shall pay the proceeds into a bank to the credit of the action and make a report upon the sale to the judge, who shall thereupon tax the costs of the sale to the party entitled thereto, and shall apportion the money realized among the parties entitled thereto, and may order the moneys realized to be paid out of the bank to the parties so found by him entitled thereto. 57 V. c. 23, s. 61.



**62. (1) Plaintiff to represent all lien-holders in proceedings for sale, etc.**—For the proper proceedings to obtain an order for sale and carrying out of the sale, and the apportionment of the moneys realized thereunder, the plaintiff shall be deemed sufficiently to represent all other lien-holders entitled to the benefit of the action unless judge otherwise orders.

**(2) Lien-holders of a class to rank *pari passu*.**—Where there are several liens under this chapter against the same party each class of the lien-holders shall, subject to the provisions of sections 6, 9 and 11, rank *pari passu* for the several amounts, and the proceeds of any sale shall, subject as aforesaid, be distributed amongst them *pro rata* according to their several claims and rights.

**(3) Adding parties.**—The judge shall have power from time to time to add any parties to the proceedings as he may deem necessary or advisable, and may direct as to service of notices on such new parties.

**(4) Death of owner, etc.**—The death of an owner or any other defendant shall not cause the proceedings to abate, but they may be continued against the personal representatives of such owner or other defendant. 57 V. c. 23, s. 62.

**63. Carriage of proceedings.**—Any lien-holder entitled to the benefit of the action may apply for the carriage of the proceedings, and the judge may thereupon make such order as to costs and otherwise as may be just; and any lien-holder who obtains the carriage of the proceedings shall, in respect of all proceedings taken by him, be deemed to be the plaintiff in the action. 57 V. c. 23, s. 63.

See Ont. Act, sec. 38.

**64. Dismissal of proceedings for want of prosecution.**—Any person affected by the proceedings may apply to the judge to dismiss the same for want of due prosecution, and the judge

may make such order upon the application as to costs or otherwise as may be just. 57 V. c. 23, s. 64.

**65. Service on guardian of infant defendant.**—Where any infants are named as defendants the appointments referred to in section 42 may be served upon the official guardian of such infants. If there is no official guardian, the judge may appoint a guardian *ad litem*. Such official guardian or guardian so appointed shall thereupon become and be the guardian *ad litem* for such infants in the proceedings, and it shall not be necessary to serve any such infant defendant with any further or other proceedings, and such infant shall be bound thereby. 57 V. c. 23, s. 65.

**66. (1) Costs.**—**Reduction of costs where in excess of ten per cent. of proceeds.**—The fees and costs in all proceedings taken under this chapter shall be such as are payable in respect of similar matters according to the ordinary procedure of the County Court, but where the taxed costs of proceedings to enforce any lien are payable out of the amount realized by such proceedings for the satisfaction of the lien, and shall exceed ten per cent. of the amount realized thereby for the satisfaction of the lien, such costs shall be reduced proportionately by the judge so as the same shall not in the aggregate exceed the said ten per cent., and no more costs than such reduced amount shall be recoverable between party and party or solicitor and client.

**(2) Limit to costs.**—In no case shall the costs taxed against any of the parties exceed ten per cent. of the amount in dispute between such party and the party to whom the costs are awarded. 57 V. c. 23, s. 66.

See Ont. Act, secs. 41, 42, 43, 44, and 45, as to costs. See also *Donal v. Segel*, (1896) 32 C.L.J. 681.

**67. Certificate for balance of claim where lien not paid in full.**—After the amount of the lien shall be realized, any lien-holder

who has proved a claim may apply to the said judge, upon notice to his primary debtor, for judgment for the payment of any balance which may remain due after deducting the amount received or payable in respect of the lien, and thereupon the judge may grant or refuse the application upon such terms as to costs or otherwise as may be just; and in case he sees fit to grant the application he will grant a certificate of the amount for which he finds the applicant is entitled to judgment for debt and costs. 57 V. c. 23, s. 67.

**68. Certificate to be enforced as a judgment of County Court.**—Such certificate may be filed in the office of the clerk of the court, and the same, whether the amount awarded exceeds the ordinary jurisdiction of the County Court or not, shall thereupon be entered in the judgment book and shall thereupon become a judgment of the court, and may be enforced in like manner as any other judgment for the payment of money is enforced in the said court. 57 V. c. 23, s. 68.

See Ont. Act, sec. 47.

**69. (1) Appeal.**—Orders and certificates made by a judge under this chapter shall be appealable to the Supreme Court in like manner as any order or decision of a County Court judge in ordinary actions is appealable.

**(2) Stay of proceedings pending appeal.**—In case of appeal from any such order or certificate, the proceedings upon such order or certificate may be stayed as in ordinary cases. 57 V. c. 23, s. 69.

See Ont. Act, sec. 39 (1) (2).

**70. Proceeding to be deemed an action.**—A proceeding under this chapter shall be deemed to be an action. 57 V. c. 23, s. 70.

**71. (1) Joinder of lien-holders.**—Proceeding by lien-holder deemed to be taken for whole class registering liens, etc.—Any

number of lien-holders may join in one action or proceeding; and any action or proceeding brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class who have registered their liens before or within fourteen days after the commencement of the action, or who shall within the said fourteen days, or within such further time as may be allowed for that purpose, file with the judge of the County Court of the county where the proceedings have been brought, a statement, entitled in or referring to the said action, of their respective claims.

**(2) Consolidation of proceedings.**—Where separate proceedings are instituted by lien-holders, the judge may consolidate the proceedings and give all such directions as to carrying on the same, after consolidation, as he may deem necessary or desirable. 57 V. c. 23, s. 71.

See Ont. Act, sec. 37.

**72. Enlargement of time.**—The judge may on good cause extend the time within which any proceedings are to be taken under this chapter, upon application made either before or after the time for taking any such proceedings has expired. 57 V. c. 23, s. 72.

**73. Order by judge for payment out of money in bank.**—Any money paid into a bank under this chapter shall be paid out by the order of the judge as he may direct. 57 V. c. 23, s. 73.

**74. Provision for other judge to act in case of interest.**—In case the judge of the County Court in which the land, in respect of which the lien is claimed is situate, is interested in any proceeding under this chapter, or related to any of the parties, the proceedings may be taken before any judge of another County Court, who in so acting shall, for the purpose of such proceedings, be deemed to be a judge of the County Court of the county in which the lands in question are situate. 57 V. c. 23, s. 74.

**75. Before whom affidavit may be sworn.**—Any affidavit required under this chapter may be sworn before a justice of the peace or commissioner for taking affidavits. 57 V. c. 23, s. 75.

See Ont. Act, sec. 17, note “j.”

**76. Application of chapter.**—The provisions of this chapter shall not apply to contracts entered into prior to the first day of August, A.D., 1894. 57 V. c. 23, s. 76.

See Ont. Act, sec. 50.

## SCHEDULE.

### FORM 1—SECTION 15.

#### CLAIM OF LIEN.

A. B. (name of claimant) of (here state residence of claimant) (if so; as assignee of ), (stating name and residence of assignor), under the Mechanics' Lien Act, claims a lien upon the estate of (here state the name and residence of owner of the land upon which the lien is claimed), in the undermentioned land in respect of the following work (or materials), that is to say: (here give a short description of the nature of the work done or the materials furnished for which the lien is claimed), which work was (or is to be) done, (or materials were furnished), for (here state the name and residence of the person upon whose credit the work is done or materials furnished, on or before the day of . The amount claimed as due (or to become due) is the sum of \$ .

The following is a description of the land to be charged: (here set out a concise description of the land to be charged, sufficient for the purpose of registration). (When credit has been given, insert): The said work was done (or materials were furnished) on credit, and the period of credit agreed to, expired (or will expire) on the day of , A.D., 19 .

Dated at this day of , A.D., 19 .

(Signature of claimant.)

51 V. c. 23—Form (1).



## FORM 2—SECTION 15.

## CLAIM OF LIEN FOR WAGES.

A. B. (name of claimant) of (here state residence of claimant) (if so, as assignee of                   ), (stating name and residence of assignor) under the Mechanics' Lien Act, claims a lien upon the estate of (here state the name and residence of the owner of the land upon which the lien is claimed), in the undermentioned land in respect of                    days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done), on or before the day of                   .

The amount claimed as due is the sum of \$                   .

The following is a description of the land to be charged: (here set out a concise description of the land to be charged, sufficient for the purpose of registration).

Dated at                    this                    day of                   , A.D., 19                   .  
(Signature of claimant.)

57 V. c. 23—Form (2).

## FORM 3—SECTION 15.

## CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons under the Mechanics' Lien Act claim a lien upon the estate of (here state the name and residence of the owner of the land upon which the lien is claimed) in the undermentioned lands in respect of wages for labor performed thereon, while in the employment of (here state name and residence or names and residences of employers of the several persons claiming the lien) .

A. B., of (residence)	\$	, for	days' wages.
C. D., of (residence)	\$	, for	days' wages.
E. F., of (residence)	\$	, for	days' wages.

The following is a description of the land to be charged:—

(Here set out a concise description of the land to be charged sufficient for the purpose of registration.)

Dated at                    this                    day of                   , A.D., 19                   .  
(Signature of claimants.)

57 V. c. 23—Form (3).

## FORM 4—SECTION 16.

### AFFIDAVIT VERIFYING CLAIM.

I, A.B., named in the above (or annexed) claim, do make oath that the said claim is true (or that the said claim so far as relates to me is true) or

We, A. B. and C. D., named in the above (or annexed) claim, do make oath, and each for himself, saith that the said claim so far as it relates to him is true.

(Where the affidavit is made by agent or assignee a clause must be added to the following effect) :—

I have full knowledge of the facts set forth in the above (or annexed) claim.

Sworn before me at                      in the                      }  
County of                      this                      day of                      } (*Signature.*)  
                    , A.D., 19                      . Or,

The said A. B. and C. D. were severally }  
sworn before me at                      in the County }  
of        this                  day of                  , } (*Signature.*)  
A.D., 19     Or,

The said E. D. was sworn before me at }  
in the County of                  this } (*Signature.*)  
day of                  , A.D., 19 . }

57 V. c. 23—Form

57 V. c. 23—Form(4).

## FORM 5—SECTION 30.

### CONTRACTOR'S AFFIDAVIT.

I, A.B., contractor (or sub-contractor, as the case may be), for certain work on the land of \_\_\_\_\_, which may be known and described as follows: (here describe land briefly), make oath and say (or do solemnly declare) that I have paid all wages earned in respect to or on the said work, up to and inclusive of the 14th day preceding this day, that is to say, up to and inclusive of the \_\_\_\_\_ day of \_\_\_\_\_.

Sworn (or declared), etc.

57 V. c. 23—Form (5).

## FORM 6—SECTION 30.

## AFFIDAVIT OF AGENT.

I, A. B., agent for C. D., contractor, (or sub-contractor, as the case may be) in respect of certain work on the land of \_\_\_\_\_, which may be known and described as follows: (here describe land briefly), make oath and say (or do solemnly declare);

That I know of my own personal knowledge, that all wages earned in respect to or on the said work up to and inclusive of the 14th day preceding this day, that is to say, up to and inclusive of the \_\_\_\_\_ day of \_\_\_\_\_, have been paid.

Sworn to (or declared), etc.

57 V. c. 23—Form (5).

## FORM 7—SECTION 33.

## AFFIDAVIT OF MORTGAGOR.

I, A. B., the mortgagor named in a certain mortgage, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, made between myself of the first part and C. D., as mortgagee, and registered in the office of the Registrar of Deeds for the County of \_\_\_\_\_, as No. \_\_\_\_\_, make oath and say (or do solemnly declare):—

That all claims of mechanics, laborers and other persons referred to in the fourth section of the Mechanics' Lien Act, with reference to work done, or materials or machinery placed or furnished on the land included in the said mortgage have been paid in full. I further say that all wages earned in respect to, or on the said work, up to and inclusive of the 14th day preceding this day, that is to say, up to and inclusive of the \_\_\_\_\_ day of \_\_\_\_\_, have been paid.

Sworn (or declared), etc.

57 V. c. 23—Form (7).

## FORM 8—SECTION 40.

## AFFIDAVIT VERIFYING CLAIM.

(*Title of Court and Cause.*)

I, \_\_\_\_\_, make oath and say: that I have read (or heard read) the foregoing statement of claim, and I say that the facts

therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me, after giving credit for all sums of money or goods or merchandise to which (naming the debtor) is entitled to credit as against me.

Sworn, etc.

57 V. c. 23—Form (8).

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### FORM 9—SECTION 42.

#### CERTIFICATE AND APPOINTMENT BY JUDGE.

*(Title of Court and Cause.)*

I certify that the above named plaintiff, claiming to be a contractor with the defendant (naming the owner), or a sub-contractor of the defendant, A. B. who is (or claims under C. D.) a contractor with (naming the owner), has filed with me a statement of his claim to enforce a mechanics' lien against (describe the lands) and take notice that I will, at my chambers at the \_\_\_\_\_ of \_\_\_\_\_, in \_\_\_\_\_, proceed on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, to determine whether the plaintiff is entitled to the lien in case his right thereto is disputed, and on the \_\_\_\_\_ day of \_\_\_\_\_ I will, in case his right is undisputed, or if disputed, is established before me, proceed and take all necessary accounts, and tax costs, for the purpose of enforcing such lien, and if you do not attend at the time and place appointed, and prove your claim, if any, the proceedings will be taken in your absence, and you may be deprived of all benefit of the proceedings.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 19 \_\_\_\_\_.

Judge of the \_\_\_\_\_ County Court.

*(Signature)*

57 V. c. 23—Form (9).

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### FORM 10—SECTION 44.

#### NOTICE DISPUTING PLAINTIFF'S RIGHT OF LIEN.

*(Title of Court and Cause.)*

I dispute that the plaintiff is now entitled to a mechanics' lien on the following grounds (setting forth the grounds shortly) :

(a) That the lien has not been prosecuted in due time, as required by statute;

(b) That there is nothing due to plaintiff;

(c) That plaintiff's lien had been vacated and discharged;

(d) That there is nothing due by A. B. (the owner) for the satisfaction of the plaintiff's claim.

*(Signature of defendant, in person, or his solicitor.)*

This notice is filed by me, A. B., defendant, in person, and my address for service is (stating address within two miles of Chambers of judge) (or, this notice is filed by Y. Z., of \_\_\_\_\_, solicitor for the defendant, A. B.).

57 V. c. 23—Form (10).

### FORM 11—SECTION 47.

#### STATEMENT OF ACCOUNTS TO BE FILED BY OWNER.

*(Title of Court and Cause.)*

Amount of contract price for work contracted to be performed (as plumber) on the lands in question herein . . . . .	\$500.00
Amount paid on account.	

1903.

June 1. Paid E. F. . . . .	\$200.00
July 5. Paid G. H. and B. K., sub-contractors of B. F. . . . .	\$100.00

Total . . . . .	\$300.00
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Balance admitted to be due . . . . .	\$200.00
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for satisfaction of lien of plaintiff and other lien-holders of same class as plaintiff.

57 V. c. 23—Form (11).

### FORM 12—SECTION 47.

#### AFFIDAVIT OF OWNER VERIFYING ACCOUNT.

*(Title of Court and Cause.)*

I, A. B., of \_\_\_\_\_, being the owner of the lands in question in this action, make oath and say:



That I have in the foregoing account (or, account now shown to me, marked "A") set forth a just and true account of the amount of the contract price agreed to be paid by me to E. F., for the work contracted to be done by him on the lands in question.

I have also justly and truly set forth the payments made by me on account thereof, and the persons (or person) to whom the same were made, and the balance of \$200.00, appearing by such account to be still due and payable, is the just and true sum now due and owing by me in respect of my contract with the said E. F.

Sworn, etc.

57 V. c. 23—Form (12).

### FORM 13—SECTION 48.

#### STATEMENT OF ACCOUNT BY LIEN-HOLDER.

(*Title of Court and Cause.*)

E. F.

To. G. H.,

1903.		Dr.	
Jan. 1.	To 12 dozen brackets.....	\$12.00	
Feb. 3.	To 50 lbs. nails.....	5.00	
Oct. 3.	To 40 sheets glass.....	40.00	
			<hr/>
		Cr.	\$57.00
1903.			
Feb. 4.	By cash.....	\$ 4.00	
June 1.	By cash.....	20.00	24.00
			<hr/>
			\$33.00

57 V. c. 23—Form (13).

### FORM 14—SECTION 48.

#### AFFIDAVIT OF LIEN-HOLDER VERIFYING CLAIM.

(*Title of Court and Cause.*)

I. G. H., of (address and occupation) make oath and say:—

I have in the foregoing account (or, in the account now shown to me, marked "A") set forth a just and true account of

the amount due and owing to me by E. H. (the owner) (or, by E. F., who is a sub-contractor with the defendant L. G.) (the owner) of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise, to which the said E. F. is justly entitled to credit in respect of the said account, and the sum of (\$33.00) appearing by said account to be due to me as the amount (or balance) of such account, is now justly due and owing to me.

Sworn, etc. (address of claimant or his solicitor for service to be set forth as in Form (10) ).

57 V. c. 23—Form (14).

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FORM 15—SECTION 58.

*(Title of Court and Cause.)*

Date

Upon motion of the aforesaid plaintiff, and upon hearing read the statement of claim, and the report made herein on the day of , it is ordered and adjudged that the land in question (describe the lands) be forthwith sold by the sheriff of the said County of ; that the purchase money be paid into the bank of to the credit of this cause; that the proceeds of the said sale be paid by the court to the persons who may be found entitled thereto by the judge of the said court.

Signed this day of , A.D., 19 .  
(Signature.)  
Judge, etc.

Entered this day of , A.D., 19 .  
(Signature.)  
Clerk.

57 V. c. 23—Form (15).

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FORM 16—SECTION 53.

CERTIFICATE VACATING LIEN.

*(Title of Court and Cause.)*

Date

I certify that the defendant A. B. (the owner) has paid into the Bank of to the credit of this cause all moneys due

and payable by him for the satisfaction of the liens of the plaintiffs and E. F., G. H., J. K., and J. L., and their liens are hereby vacated and discharged so far as the same affect the following lands: (describe lands).

(Signature.)

Judge, etc.

57 V. c. 23—Form 16.

### FORM 17—SECTION 52.

#### CERTIFICATE VACATING LIEN.

(Title of Court and Cause.)

Date

I certify that I have enquired and find that the plaintiff is not entitled to any mechanics' lien upon the lands of the defendant A. B. (the owner), and that his claim for lien is vacated and discharged so far as the same affects the following lands: (describe lands) .

(Signature.)

Judge, etc.

57 V. c. 23—Form (17).

### FORM 18—SECTION 67.

#### CERTIFICATE FOR JUDGMENT FOR BALANCE AFTER REALIZATION OF LIEN.

(Title of Court and Cause.)

Date

Upon the application of A. B., on due notice to C. B., I do certify that A. B. is entitled under the provisions of the Mechanics' Lien Act to recover against C. D. \$                      debt and \$ costs, and that upon filing this certificate in the office of the clerk of this court he is entitled to enforce the same as a judgment of the court.

(Signature.)

Judge, etc.

57 V. c. 23—Form (18).

REVISED ORDINANCES OF THE NORTH-WEST  
TERRITORIES.AN ORDINANCE RESPECTING LIENS IN FAVOR OF MECHANICS  
AND OTHERS.

THE Lieutenant-Governor by and with the advice and consent of the Legislative Assembly of the Territories enacts as follows:—

## SHORT TITLE.

1. **Short title.**—This Ordinance may be cited as “The Mechanics’ Lien Ordinance.” R.O. c. 48, s. 1.

2. **Interpretation.**—In this Ordinance

(1) **“Contractor.”**—The expression “contractor” means a person contracting with or employed directly by the owner for the doing of work or placing or furnishing of machinery or materials for any of the purposes mentioned in this Ordinance;

(2) **“Sub-contractor.”**—The expression “sub-contractor” means a person not contracting with or employed directly by the owner for the purposes aforesaid, but contracting with or employed by the contractor or under him by another sub-contractor;

(3) **“Owner.”**—The expression “owner” shall extend to and include a person having any estate or interest in the lands upon or in respect of which the work is done or materials or machinery are placed or furnished at whose request and upon whose credit or on whose behalf or consent or for whose direct benefit any such work is done, or materials or machinery placed or furnished, and all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced or the materials or machinery furnished have been commenced to be furnished. R. O. c. 48, s. 2.

See Ont. Act, sec. 2. The Ontario Act expressly includes municipal corporations and railway companies in the definition of “owner.”

## LIEN FOR WORK ON MATERIALS.

3. Agreement as to liens.—Third party's rights.—No agreement shall be held to deprive any one otherwise entitled to a lien under this Ordinance and not a party to the agreement of the benefit of the lien, but the lien shall attach notwithstanding such agreement. R.O. c. 48, s. 3.

See Ont. Act, sec. 6.

4. Nature of lien.—Unless he signs an express agreement to the contrary, every mechanic, machinist, builder, miner, laborer, contractor, or other person doing work upon or furnishing materials to be used in the construction, alteration or repair of any building or erection, or erecting, furnishing or placing machinery of any kind in, upon or in connection with any building, erection or mine, shall, by virtue of being so employed or furnishing, have a lien for the price of the work, machinery or materials, upon the building, erection or mine, and the lands occupied thereby or enjoyed therewith, limited in amount to the sum justly due to the person entitled to the lien. R. O. c. 48, s. 4.

See Ont. Act. sec. 4.

A lien may be registered and enforced against a mere possessory interest. *Christie v. Mead*, 8 C.L.T. 312.

Where a tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a *quantum meruit*. The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers did not estop the plaintiff from disputing its *bonâ fides* as against the defendant. *Degagne v. Chave*, (1895) 2 Terr. L.R. 210. Failure by the owner to supply material which the contract provides he shall supply discharges a penal clause. (*Ib.*) Where a building contract provided for the certificate of an architect and no architect is appointed, the provision is inoperative. On this latter point Scott, J., said: "Chave & Co. further claim that, by the terms of the contract it was a condition precedent to the right to sue, that



a certificate should be furnished by plaintiffs, signed by the architect of defendants, the bank, showing the amount due under the contract. Plaintiffs, besides denying this, allege that the building was completed to the satisfaction of the architect, and that he so certified. The only contract put in was the specifications, which contained sundry stipulations, but I cannot find in it any such provision as that alleged by Chave & Co. Even if such a provision was contained in the contract, it has not been shown that any architect was ever appointed by the bank. In fact the only architect appointed was the one appointed by Chave & Co. *Hunt v. Bishop* shows that, where no architect is appointed by the person to whom the power of appointment is given, such provision becomes inoperative." *Degagne v. Chave, supra*.

A general assignment for the benefit of creditors was made of all the assignor's real and personal estate, except what was exempt from seizure and sale under execution. The land was not specifically described, but the assignment contained a covenant on the part of the assignor to execute such instruments as should be required to effectuate the assignment. An order for the administration of the estate was subsequently made, and this was followed by the sale of the land under the direction of a judge, and a transfer by the assignor to the purchaser. The land was subject to two mortgages; and \$1,530, the surplus of the price in excess of the mortgages, was paid into court. The assignor was an alien friend resident in the Territories. Held, *per Richardson, J.*, that an alien friend resident in the Territories is entitled to the benefit of the provisions of the Exemptions Ordinance, notwithstanding the provisions of the Naturalization Act, R.S.C. (1886) ch. 113, sec. 3. Affirmed on appeal to court *en banc*. Also that the assignor was entitled as an exemption to the extent of \$1,500, out of the \$1,530, the excess of the price of the land beyond the mortgages to which it was subject. Affirmed on appeal to court *en banc*. That an execution creditor whose execution was registered subsequent to the mortgages, and was the only one registered prior to the assignment though other executions were registered prior to the administration order and the execution of the transfer by the assignor, was entitled to the thirty dollars in priority to these subsequent executions. On appeal to the court *en banc*, the whole sum of \$1,530 was held to be subject, in priority to the first execution creditor, to the claim of the holder of a mechanics' lien, who had obtained judgment,

and to his costs, which exhausted his \$30. That while the \$1,500 was subject to the payment of a claim under a mechanics' lien which was registered, and on which action was commenced before the date of the assignment, it was not subject to the payment of either of two other claims under mechanics' liens registered before the assignment, on the ground (without deciding on the objection that no action to enforce these liens had been commenced, it appearing, however, that the time limited for that purpose had not expired at the date of the assignment), that the claimants had, in their statutory declarations proving their claims against the estate, stated that they held no security for their claims. *In re Demaurez*, (1902) 5 Terr. L.R. 84.

**5. Property on which lien shall attach.**—The lien shall attach upon the estate and interest of the owner, as defined by this Ordinance, in the building, erection or mine, in respect of which the work is done or the materials or machinery placed or furnished and the land occupied thereby or enjoyed therewith.

(2) **Where estate charged is leasehold.**—In cases where the estate or interest charged by the lien is leasehold the land itself may also with the consent of the owner thereof be subject to said lien provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof and duly verified.

(3) **Prior mortgage.**—In case the land upon or in respect of which any work as aforesaid is executed or labor performed or upon which materials or machinery are placed is encumbered by a prior mortgage or other charge and the selling value of the land is increased by the construction, alteration or materials or machinery, the lien under this Ordinance, shall be entitled to rank upon the increased value in priority to the mortgage or other charge. R.O. c. 48, s. 5; No. 24 of 1898, s. 1.

See Ont. Act, sec. 7 (1).

**6. Claim for wages.**—Without prejudice to any lien which he may have under the preceding sections every mechanic, laborer

or other person who performs labor for wages upon the construction, alteration or repairs of any building or erection or in erecting or placing machinery of any kind in, upon or in connection with any building, erection or mine shall to the extent of the interest of the owner have upon the building, erection or mine, and the land occupied thereby or enjoyed therewith a lien for such wages, not exceeding the wages of thirty days or a balance equal to his wages for thirty days.

(2) The lien for wages given by this section shall attach when the labor is in respect of a building, erection or mine on property belonging to the wife of the person at whose instance the work is done, upon the estate or interest of the wife in such property as well as upon that of her husband. R.O. c. 48, s. 6.

See Ont. Act, sec. 14.

**7. Owner to retain 10 per cent. of contract price for thirty days.**  
—In all cases the owner shall in the absence of a stipulation to the contrary be entitled to retain for a period of thirty days after the completion of the contract ten per centum of the price to be paid to the contractor. R.O. c. 48, s. 7.

See Ont. Act, sec. 11. See also *McDougall v. McLean et al.*, (1893) 1 Terr. L.R. 450.

**8. Lien claimed by sub-contractor.**—In case the lien is claimed by a sub-contractor the amount which may be claimed in respect thereof shall be limited to the amount payable to the contractor or sub-contractor (as the case may be) for whom the work has been done or the materials or machinery have been furnished or placed. R.O. c. 48, s. 8.

See Ont. Act, sec. 10.

**9. Payment made in good faith without notice of lien.**—All payments up to ninety per centum of the price to be paid for the work, machinery or materials as defined by sec. 4 of this

Ordinance, made in good faith by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing by the person claiming the lien has been given to such owner, contractor or sub-contractor (as the case may be) of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this Ordinance, but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this Ordinance.

(2) A lien shall in addition to all other rights or remedies given by this Ordinance also operate as a charge to the extent of ten per centum of the price to be paid by the owner for the work, machinery or materials, as defined by sec. 4 of this ordinance, up to ten days after the completion of the work or of the delivery of the materials in respect of which such lien exists and no longer, unless notice in writing be given as herein provided.

(3) A lien for wages for thirty days, or for a balance equal to the wages for thirty days, shall, to the extent of the said ten per cent. of the price to be paid to the contractor, have priority over all other liens under this Ordinance and over any claim by the owner against the contractor for or in consequence of the failure of the latter to complete his contract. R.O. c. 48, s. 9.

See Ont. Act, sec. 11.

**10. Lien not to increase liability of owner.**—Save as herein provided, the lien shall not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor. R.O. c. 48, s. 10.

See Ont. Act, sec. 9, to the same effect.

**11. Persons having claims against the lien-holders.**—All persons furnishing material to or doing labor for the person having a lien under this Ordinance in respect of the subject of such lien, who notify the owner of the premises sought to be affected there-

by, within thirty days after such material is furnished or labor performed, of an unpaid account or demand against such lien-holder for such material or labor, shall be entitled, subject to the provisions of sections 6 and 9 of this Ordinance, to a charge therefor *pro rata* upon any amount payable by such owner under said lien; and if the owner thereupon pays the amount of such charge to the person furnishing material and doing labor as aforesaid, such payment shall be deemed a satisfaction *pro tanto* of such lien. R.O. c. 48, s. 11.

**12. Disputes to be settled by action or arbitration.**—In case of a dispute as to the validity or amount of an unpaid account or demand, of which notice is given to the owner under the preceding section, the same shall be first determined by action in the Supreme Court in that behalf, or by arbitration in manner mentioned in section 14 of this Ordinance, at the option of the person having the unpaid account or demand against the lien-holder; and pending the proceedings to determine the dispute, so much of the amount of the lien as is in question therein may be withheld from the person claiming the lien. R.O. c. 48, s. 12.

**13. Failure to pay.**—In case the person primarily liable to the person giving such notice as mentioned in section 11 of this Ordinance, fails to pay the amount awarded within ten days after the award is made or judgment given, the owner, contractor, or sub-contractor may pay the same out of any moneys due by him to the person primarily liable as aforesaid, on account of the work done or materials or machinery furnished or placed in respect of which the debt arose; and such payment, if made after an award or judgment, or if made without any arbitration or suit having been previously had or dispute existing, then, if the debt in fact existed, and to the extent thereof shall operate as a discharge *pro tanto* of the moneys so due as aforesaid to the person primarily liable. R.O. c. 48, s. 13.



**14. Arbitration of sub-contractor's claim.**—In case a claim is made by a sub-contractor in respect of a lien on which he is entitled, and a dispute arises as to the amount due or payable in respect thereof, the same shall be settled by arbitration.

(2) One arbitrator shall be appointed by the person making the claim, one by the person by whom he was employed, and the third arbitrator by the two so chosen.

(3) The decision of the arbitrators or a majority of them shall be final and conclusive.

(4) In case either of the parties interested in any such dispute refuses or neglects within three days after notice in writing requiring him to do so, to appoint an arbitrator, or if the arbitrators appointed fail to agree upon a third, the appointment may be made by a judge of the Supreme Court. R.O. c. 48, s. 14; No. 24 of 1898, s. 2.

**15. Material affected by lien not to be removed.**—During the continuance of a lien no portion of the property or machinery affected thereby shall be removed to the prejudice of the lien; and any attempt at such removal may be restrained by application to the Supreme Court or a judge thereof. R.O. c. 48, s. 15.

See Ont. Act, sec. 16 (1).

#### REGISTRATION OF LIEN.

**16. Registration of lien.**—A claim of lien applicable to the case may be deposited in the land titles office of the land registration district in which the land is situated and shall state:

(a) The name and residence of the claimant, and of the owner of the property to be charged and of the person for whom and upon whose credit the work is done or materials or machinery furnished and the time or period within which the same was or was to be done or furnished;

(b) The work or material or machinery furnished;

- (c) The sum claimed as due or to become due;
- (d) The description of the property to be charged;
- (e) The date of expiring of the period of credit agreed to by the lien-holder for payment for his work, materials or machinery where credit has been given.

(2) Such claim shall be verified by the affidavit of the claimant or his agent. R.O. c. 48, s. 16; No. 24 of 1898, s. 3.

See Ont. Act, sec. 17.

**17. Claim for wages.—Uniting several claims.**—A claim for wages may include the claims of any number of mechanics, laborers or other persons aforesaid who may choose to unite them, in such case each claimant shall verify his claim by his affidavit, but need not repeat the facts set out in the claim, and an affidavit substantially in accordance with Form D in the schedule to this Ordinance shall be sufficient. R.O. c. 48, s. 17.

See Ont. Act, secs. 31 and 32.

**18. Claims to be filed as an incumbrance.**—The registrar upon payment of the proper fee shall enter and register the claim as an incumbrance against the land or the estate or interest in land therein described as provided in *The Land Titles Act*, 1894. The said claim of lien may be described as a mechanics' lien. No. 24 of 1898, s. 4.

See Ont. Act, sec. 20.

**19. Lien-holder a purchaser pro tanto.**—Where a claim is so deposited the person entitled to the lien shall be deemed a purchaser *pro tanto*. R.O. c. 48, s. 19.

See Ont. Act, sec. 21.

**20. Time for registration.**—Where the lien is for wages under secs. 6 or 9 of this Ordinance the claims may be registered:

- (a) At any time within thirty days after the last day's labor for which the wages are payable; or

(b) At any time within thirty days after the completion of the construction, alteration or repair of the building or erection or after the erecting or placing of the machinery in or towards which, respectively, the labor was performed and the wages earned but so that the whole period shall not exceed sixty days from the last day's labor aforesaid.

(2) Such lien shall not be entitled to the benefit of the provisions of sections 6 and 9 of this Ordinance after the said respective periods unless the same is duly registered before the expiration of the said periods so limited.

(3) Such lien shall have the same priority for all purposes after as before registration. R. O. c. 48, s. 20.

See Ont. Act, sec. 22 (4).

**21. Time for registration.** — In other cases the claim of lien may be deposited before or during the progress of the work or within thirty days from the completion thereof or from the supplying or placing the machinery. R. O. c. 48, s. 21.

See Ont. Act, sec. 22.

#### PROCEEDINGS TO REALIZE LIEN.

**22. Actions to enforce unregistered lien.—Time for.**—Every lien which has not been duly deposited under the provisions of this ordinance shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof unless in the meantime proceedings are instituted to realize the claim under the provisions of the ordinance and a certificate thereof (which may be granted by the court in which or judge before whom the proceedings are instituted) is duly filed in the land titles office of the land registration district wherein the property in respect of which the lien is claimed is situated. R.O. c. 48, s. 22.

See Ont. Act, sec. 23.

**23. Action to enforce registered lien.**—Every lien which has been duly deposited under the provisions of this ordinance shall absolutely cease to exist after the expiration of ninety days after the work has been completed or materials or machinery furnished or wages earned or the expiry of the period of credit where such period is mentioned in the claim of lien filed unless in the meantime proceedings are instituted to realize the claim under the provisions of this ordinance and a certificate thereof (which may be granted by the court in which or judge before whom the proceedings are instituted) is duly registered in the land titles office of the land registration district wherein the property in respect of which the lien is claimed is situate. R. O. c. 48, s. 23.

See Ont. Act, sec. 24.

**24. Time for action if no period of credit or none stated.**—If there is no period of credit or if the date of expiry of the period of credit is not stated in the claim so filed the lien shall cease to exist upon the expiration of ninety days after the work has been completed or materials or machinery furnished unless in the meantime proceedings shall have been instituted pursuant to section 23 of this Ordinance. R.O. c. 48, s. 24.

See Ont. Act, sec. 25.

**25. Lien realizable in Supreme Court.**—In all cases the lien may be realized in the Supreme Court in the judicial district in which the land charged is situated according to the ordinary procedure of that court. R.O. c. 48, s. 28.

See Ont. Act, sec. 31 (1).

**26. Lien-holders joining in action.**—Action enuring to class.—Any number of lien-holders may join in one action and any action brought by a lien-holder shall be taken to be brought on behalf of all the lien-holders of the same class who shall have registered their liens before or within thirty days after the com-

mencement of the action or who shall within the said thirty days file in the proper office of the court from which the writ issued a statement of their respective claims intituled in or referring to the said action.

(2) **Death of plaintiff or refusal to proceed.**—In the event of the death of the plaintiff or his refusal or neglect to proceed any other lien-holder of the same class who has registered his claim or filed his statement in the manner and within the time above limited for that purpose may be allowed to prosecute and continue the action on such terms as may be considered just and reasonable by the court or judge.

(3) **Sale of land, time for.**— In case of a sale of the estate and interest charged with the lien the court or judge may direct the sale to take place at any time after one month from the recovery of judgment and it shall not be necessary to delay the sale for a longer period than is requisite to give reasonable notice thereof.

(4) **Machinery.**— The said court or judge may also direct the sale of any machinery and authorize its removal.

(5) **Costs.**—When judgment is given in favor of a lien the court or judge may add to the judgment the costs of and incidental to registering the lien as well as the costs of the action.

See *In re Demaurez*, 5 Terr. L.R. 84.

(6) **Class to rank *pari passu*.**—Where there are several liens under this ordinance against the same property each class of the lien-holders shall, subject to the provisions of sections 5, 9 and 11, of this ordinance, rank *pari passu* for their several amounts against the said property and the proceeds of any sale shall, subject as aforesaid, be distributed amongst such lien-holders *pro rata* according to their several classes and rights and they



shall respectively be entitled to execution for any balance due to them respectively after said distribution.

(7) **Removing lien on terms.**— Upon application the court or judge may receive security or payment into court in lieu of the amount of the claim and may thereupon vacate the registry of the claim.

(8) **Annuling registration.**— The court or judge may annul the said registry upon any other ground.

(9) **Summary hearing and determination.**— In any of the cases mentioned in sub-sections (7) and (8) the court or judge may proceed to hear and determine the matter of the said lien and make such order as seems just, and in case the person claiming to be entitled to such lien has wrongfully refused to sign a discharge thereof or without just cause claims a larger sum than is found by such court or judge to be due the court or judge may order and adjudge him to pay the costs to the other party. R.O. c. 48, s. 29.

See Ont. Act, secs. 31 and 35.

#### DEATH OF LIEN-HOLDER. ASSIGNMENT OF LIEN.

**27. Death of holder.**— In the event of the death of a lien-holder his right of lien shall pass to his personal representatives and the right of a lien-holder may be assigned by any instrument in writing. R.O. c. 48, s. 25.

See Ont. Act, sec. 26.

#### DISCHARGE OF LIEN.

**28. Discharge of lien.**— A lien may be discharged by a receipt signed by the claimant or his agent duly authorized in writing acknowledging payment and verified by affidavit and filed, such receipt shall be numbered and entered by the registrar like other instruments but need not be copied in any book; the

fees shall be the same as for registering a claim of lien. R.O. c. 48, s. 26.

See Ont. Act, sec. 27.

**29. Discharge to be at contractor's cost.**—When there is a contract for the prosecution of the work as hereinbefore mentioned the registration of all discharges of liens shall be at the cost of the contractor unless a court or judge otherwise orders. R.O. c. 48, s. 27.

#### EXECUTION AGAINST PERSONS SUPPLYING MATERIAL.

**30. Materials exempt from execution.**—Where any mechanic, artisan, machinist, builder, miner, contractor or any other person has furnished or procured materials for use in the construction, alteration, or repair of any building, erection or mine at the request of and for some other person, such materials shall not be subject to execution or other process to enforce any debt (other than for the purchase thereof) due by the person furnishing or procuring such materials, and whether the same have or not been in whole or in part worked into or made part of such building or erection. R.O. c. 48, s. 30.

See Ont. Act, sec. 16.

#### LIENS ON CHATTELS.

**31. Liens for improvement of chattels. Enforcing.**—Every mechanic or other person who has bestowed money or skill, and materials upon any chattel or thing in the alteration and improvement of its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists, but not afterwards in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid,

have the right in addition to all other remedies provided by law to sell the chattel or thing in respect of which the lien exists on giving one month's notice by advertisement in a newspaper published in the locality in which the work was done, or in case there is no newspaper published in such locality, or within ten miles of the place where the work was done, then by posting up not less than five notices in the most public places within the locality for one month, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the residence or last known place of residence, if any, of the owner as the case may be, or by mailing the same to him by registered letter if his address be known.

(a) Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale and shall upon application pay over any surplus to the person entitled thereto. No. 5 of 1889.

See Ont. Act, sec. 51. See also Chapter IV. *ante*, "Mechanics' Liens upon Personalty."

## FORMS.

**32. Forms.**—The forms in the schedule hereto shall be deemed sufficient for the purposes specified in such schedule.

### SCHEDULE.

#### FORM A.

#### CLAIM OF LIEN.

A. B., (name of claimant) of (here state residence of claimant), (if so, as assignee of, state name and residence of original lien-holder) claims a lien under The Mechanics' Lien Ordinance upon the estate of (here state the name and residence of the owner of the land upon which the lien is claimed) in the undermentioned land in respect of the following work (or ma-

terials) that is to say: (here give a short description of the work done or materials furnished and for which the lien is claimed) which work was (or is to be) done (or materials furnished) for (here state the name and residence of the person upon whose credit the work is done or materials furnished) on or before the day of

The following is the description of the work done (or material or machinery furnished, as the case may be):

(State the work done or material or machinery furnished.)

The amount claimed as due (or to become due) is the sum of \$

The following is the description of the land to be charged: (here set out a concise description of the land to be charged sufficient for the purpose of registration).

When credit has been given, insert: The said work was done (or materials were furnished) and the period of credit agreed to expired (or will expire) on the      day of      1 .  
Dated at      this      day of      .

*(Signature of claimant).*

## FORM B.

### CLAIM OF LIEN FOR WAGES.

A. B., (name of claimant) of (here state residence of claimant) (if so, as assignee of, state name and residence of original lien-holder) claims a lien under The Mechanics' Lien Ordinance, upon the estate of (here state the name and residence of the owner of the land upon which the lien is claimed) in the undermentioned land in respect of      days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done) on or before the day of

The amount claimed as due is the sum of \$

The following is the description of the land to be charged: (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at      this      day of      A.D. 1 .

*(Signature of Claimant).*

## FORM C.

## CLAIM OF LIEN FOR WAGES WHEN SEVERAL CLAIMANTS.

The following persons claim a lien under "The Mechanics' Lien Ordinance" upon the land (here state the name and residence of the owner of the land) in respect of wages for labor performed thereon while in employment of (here state name and residence or names and residences of employers of the several persons claiming the lien).

A. B., of (residence) \$                      for                      days' wages.

C. D., of (residence) \$                      for                      days' wages.

E. F., of (residence) \$                      for                      days' wages.

The following is the description of the land to be charged: (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at                      this                      day of                      A.D. 1                      .

*(Signatures of the several claimants.)*

(If any of the above named claimants are assignees of the original lien-holder that fact must be stated and the name and residence of the original lien-holder stated).

## FORM D.

## AFFIDAVIT VERIFYING CLAIM.

I, A. B., named in the above (or annexed) claim do make oath that the said claim is true (or the said claim so far as it relates to me is true).

OR,

We, A. B. and C. D., named in the above (or annexed) claim, do make oath and each for himself saith that the said claim, so far as it relates to him, is true.

(Where affidavit is made by agent or assignee, a clause must be added to the following effect: I have full knowledge of the facts set forth in the above or annexed claim).

Sworn before me at

in the North-West Territories, this  
day of                      A.D. 1                      .



OR,

The said A. B. and C. D. were severally  
sworn before me at                    in the  
North-West Territories, this       day of  
A.D. 1       .

OR,

The said E.F. was sworn before me at  
                                 in the North-West Territories,  
this       day of A.D. 1       .

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## CHAPTER 18.

## OF THE ORDINANCES OF 1903 (SECOND SESSION).

An Ordinance to amend Chapter 59 of The Consolidated Ordinances 1898, intituled An Ordinance respecting Liens in favor of Mechanics and others.

[Assented to November 21, 1903.]

**T**HE Lieutenant-Governor by and with the advice and consent of the Legislative Assembly of the Territories enacts as follows:

**1. Section 2 amended.**—Section 2 of the Mechanics' Lien Ordinance is hereby amended by adding thereto the following paragraph:

“(4) **Laborer.**—The expression laborer shall extend to and include every mechanic, artisan, machinist, miner, builder or other person doing labor for wages.”

**2. Receipted pay rolls to be posted on works.**—No contractor or sub-contractor shall be entitled to demand or receive any payment in respect of any contract where the contract price exceeds five hundred dollars until he or some person in charge of the works or improvements shall post upon the works or improvements a copy of the receipted pay roll from the hour of 12 noon to the hour of 1 p.m. on the first legal day after pay day and shall have delivered to the owner or other person acting on his behalf the original pay roll containing the names of all laborers who have done work for him upon such works or improvements with a receipt in full from each of the said laborers with the amounts which were due and had been paid to each of them set opposite their respective names which pay roll may

be in the form in the schedule hereto and no payment made by the owner without the delivery of such pay roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate or interest in favor of any such laborer. No assignment by the contractor or any sub-contractor of any moneys due in respect to the contract shall be valid as against any lien given by the said ordinance. As to all liens except that of the contractor the whole contract price shall be payable in money and shall not be diminished by any prior or subsequent indebtedness, set-off or counter-claim in favor of the owner against the contractor.

(2) A substantial compliance only with this section shall be required and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof unless in the opinion of the court or judge adjudicating upon the lien under the said ordinance the owner, contractor, sub-contractor, mortgagee or other person is prejudiced thereby and then only to the extent to which he is prejudiced and the court or judge may allow the affidavit and statement of claim to be amended accordingly.

(3) Section 9 of the said ordinance is to be read subject to the provisions of this section.

3. This ordinance shall come in force on the first day of March, 1904.

### SCHEDULE.

#### PAY ROLL.

Name	Description.	From 5th January, 1903, to 10th January, 1903 (inclusive).			Amount Paid	Date of payment	Received payment in full
		Number of days employed	Rate per day	Total amount earned			
R. Roe...	. . . . .	Six days	\$3.50	\$21.00	\$21.00	12th Jan. 1903	R. Roe.

I hereby certify that the above statement is correct to the best of my knowledge and belief and is made by me on account of (my contract to or employment by, *as the case may be*), [*here insert brief description of the work*] for [*owner's name*] up to the            day of            190 .

(Signed),

Contractor.

Dated            day of            190 .

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## QUEBEC LAW.

The civil law, in its relation to the subject of mechanics' liens, has already been referred to. (See Chapter I., p. 2.)

The law of the Province of Quebec on this subject is based on the civil law as originally declared in Article 2013 of the Civil Code, which came into force on the first of August, 1866. The law was changed in 1894, when twelve articles were added, 2013A to 2013L, and these articles have subsequently undergone some change. Article 2013 at present reads as follows:

“**2013.** A laborer, workman, architect and builder have a right of preference over the vendor and other creditors, on the immovable, but only upon the additional value given to the immovable by the work done.”

“In case the proceeds are insufficient to pay the laborer, workman, architect and builder, or in cases of contestation, the additional value given by the work is established by a relative valuation effected in the manner prescribed in the Code of Civil Procedure.”

“The aforesaid privileged claim is paid only upon the amount established as being the additional value given to the immovable by the work done.”

The articles in the Code of Procedure referred to in Article 2013 of the Civil Code are the three following:—

### ARTICLE 805.

*Code of Procedure.*—“In case the disposable moneys are insufficient, the prothonotary, if the record does not offer him sufficient data to confirm the relative valuation himself, must suspend the distribution and report the facts to the judge, in the following cases:—



“(1) When several immovables or pieces or parcels of land, separately charged with different claims, are sold for one and the same price;

“(2) When a vendor's claim comes in concurrence with a builder's privilege;

“(3) When a creditor has some preferable claim upon part of an immovable by reason of improvements or other cause.”

#### ARTICLE 806.

“806. Upon application of one of the parties interested, after notice given to the others, the judge orders experts to be named in the ordinary manner, in order to establish the respective values of the immovables, pieces of land, or improvements, and the proportion which should be allotted to each out of the moneys to be distributed.”

#### ARTICLE 807.

“807. The relative valuation being established upon the report of the experts, the cause is sent back to the prothonotary by the judge in order that he may proceed to determine the order of the collocation and the distribution of the moneys.”

#### DECISIONS UNDER ARTICLE 2013.

The mason has a special privilege in the nature of a mortgage upon any building erected by him and for repairs. This privilege, however, will not be allowed to the prejudice of other creditors of the proprietor, unless within a year and day there be something specific to show the nature of the work done or the amount of the debt due thereon.

Court of Appeals, 1827, *Jourdain & Miville*, Stuart's Rep. 263; 1 R.J.R.Q. 249, 513.

The valuation made at the instance of the architect or builder at the time of the inscription of his privilege may be attacked by the vendor, and the latter may obtain a contradictory valuation, if the two privileges are in conflict.

Monk, J., 1860, *Doutre v. Greene*, 5 L.C.J. 152; 9 R.J.R.Q. 137.

The builder of a railway has no right of retention on the work done by him unless he has acquired and preserved the privilege conferred by Article 2013 on the additional value given by him to the immovables.

Rainville, J., 1882, *Banque d'Hochelaga v. Montreal, Portland & Boston Ry. Co.*, M.L.R. 1 S.C. 146; 8 L.N. 99.

In virtue of Article 2013 C.C., the builder who has observed the formalities required by that article has no privilege other than for the additional value given to the real estate by the buildings put up by him, and he has no privilege or hypothec on the land itself.

The registration of the relative valuation required by Article 2013 for the preservation of the said privilege does not create a tacit hypothec in favor of the builder on the said immovable.

K. B., 1885, *Corporation du Seminaire de St. Hyacinthe & Banque de St. Hyacinthe*, M.L.R. 1 Q.B. 396; 4 Q.B.R. 293; 29 L.C.J. 261; 8 L.N. 354.

It was sufficient for the expert to state in his second report, made within the six months, that the works described had been executed and that such works had given to the immovable the additional value fixed by him.

If the expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation.

*Dufresne v. Prefontaine*, 21 S.C.R. 607; Q.B. 16 L.N. 48.

Held (reversing the judgment of Trenholme, J.):—The fact of describing in the memorial for the registration of a laborer's privilege the immovables affected by such privilege in the following manner: "two lots of land known and designated under the numbers two C. and three C. of the official sub-division of lot number 907," instead of designating them, as described in the *cadastre*, as: "two lots of land known and designated under the numbers, two, sub-division C., and three, sub-division C., both of the sub-division of official No. 907," is not an irregularity sufficient to involve the nullity of the registration of the privilege, especially when the designation in the memorial is identical with that contained in the title of the owner (who had acquired

the immovables from the respondent) and in the report of seizure, and when the registrar, on presentation of the memorial, had registered the same against these immovables such as they were described in the books of his office.

In this case, the respondent who had caused the immovables to be sold had filed in the record a declaration that the land was not worth more than \$3,000 (the property and the buildings thereon had been sold for \$5,000), and a hypothecary creditor represented by the attorney of the respondent had obtained an order from the court for the distribution of the moneys without proceeding to a *ventilation* (i.e., relative valuation of the land and of the buildings to establish the value of improvement).

Held, that, under these circumstances, the respondent, who was *dominus litis*, must be held to have acquiesced in the omission of such ventilation, and that he could not be heard to complain that the amount of the increase of value given to the land by the new constructions thereon had not been established by a ventilation.

The omission by the workman to give notice to the proprietor of the immovable within three days after the registration of the memorial (2103 C.C.) does not affect the validity of this registration or of the privilege.

*Daniel v. MacDuff*, in the Court of King's Bench in Appeal, 1904, R.J.Q. 13 K.B. 361.

The holder of a note secured by a builder's lien may, in suing on it, claim a declaration of the existence of the lien in his favor. A contractor may take, in his own name, a builder's lien not only for the work done by himself, but also for that done by a sub-contractor, and in these circumstances it is not necessary that his contract with the sub-contractor should be made known to the owner of the works to be constructed.

The time limited for registry of a builder's lien runs from the date on which the works were entirely completed and not from that on which the person entitled to the lien begins to profit from their construction before completion. The owner of the works to be constructed cannot take advantage of the lien being registered too late nor even of entire failure to register it. *La Banque Jacques Cartier v. Picard*, (1900) 18 Que. S.C. 502.

The plaintiff having contracted to furnish materials to a builder to be used in the construction of a building, gave written

notice to the defendant, owner of the land, under Art. 2013 g, of the Civil Code of Quebec, and subsequently registered a memorial that he had furnished materials to the amount stated, and he then notified defendant of such registration. The present action was brought against the owner of the immovable more than three months subsequently, asking that he be condemned to pay the amount. No proceedings had been taken against the purchaser of the materials: Held, that the privilege created in favor of the supplier of the materials, and his recourse against the owner of the land, by the registration of the memorial, lapse unless legal proceedings are taken within three months following the notice to have the debtor condemned—by the “debtor” in Art. 2013 i being meant the purchaser of the materials. *Lalonde v. LaBelle*, (1899) 16 Que. S.C. 573.

A contractor who stipulates directly with the proprietor of a building which is being constructed, is entitled to register a privilege under the terms of Article 2013 as amended by 59 Vict. (Q.) ch. 42.

The additional value referred to in the above article is the additional value given to the immovable by the work at the time it is done. *Galarneau v. Tremblay*, (1903) 22 Que. S.C. 143. (Archibald, J.)

A manufacturer who enters into an agreement with a contractor to deliver a number of closets intended for a building which the contractor has undertaken to construct, is not a workman, but a furnisher of materials. The registry by the manufacturer of a workman's lien upon the immovable of the owner to secure payment of the price of the closets is void under the circumstances, the manufacturer not being entitled to other security for such payment than that given by law in Art. 2013 g, 2013 h, 2013 i, 2013 l, when he conforms to the provisions of these several articles. The contract between the manufacturer and the contractor is a sale and not a letting of work (*louage d'ouvrage*). To enable a workman to claim a lien upon the immovable of an owner it is essential that he should be employed upon such immovable. It is not sufficient for him to work at and finish materials intended for the building which the owner constructs or causes to be constructed. *Montmorency Cotton Mills Co. v. Gignac*, (1901) 10 Que. Q.B. 158.

When the owner of land builds on it, the person furnishing

material who desires to obtain a right of hypothec should, before delivery of the material, give notice to him who lends money to the owner, and a notice given too late to such lender will not suffice to give said right of hypothec. When two portions of the same land have been sold by separate contracts to different purchasers and buildings are put upon it, the furnisher of material for the building should in the particulars of claim (*bordereau*) which he registers under Art. 2013, indicate the part of the land belonging to each purchaser, and his registration will have no effect if he describes the whole land as being the property of the two purchasers. *Paquette v. Mayer*, (1900) 18 S.C. 563.

The enhanced value given to an immovable by a workman is settled by valuation at the time of the decree, when the moneys are insufficient to pay the workman who has registered a privilege or in case the increased value is disputed by parties interested. The contention when it can take place should be raised by a pleading *au fond*, and not by inscription *en droit*. The defendant being owner of the immovable, the workman need not allege the increase in value. *Therrien v. Hainault*, (1901) 8 R. de J. 314; 5 Que. P.R. 61. (Pagnuelo, J.)

See also under this article, *Brassard v. Chisholm*, (1898) 4 R.Q. de J. 419, and *La Banque Jacques Cartier v. Picard*, (1899) R.J.Q. 15 S.C. 389.

CIVIL CODE, 2013A.—“For the purposes of the privilege the laborer, workman, architect and builder rank as follows:—(1) The laborer; (2) The workman; (3) The architect; (4) The builder.

“2013B.—The right of preference or privilege upon the immovable exists as follows:—

“Without the registration of the claim, in favor of the debt due the laborer, workman and builder, during the whole time they are occupied at the work, or while such work lasts, as the case may be; and, with registration, provided it be registered within thirty days following the date upon which the building has become ready for the purpose for which it is intended.



“But such right of preference or privilege shall exist only for one year from the date of the registration, unless a suit be taken in the interval or unless a longer delay for payment has been stipulated in the contract.”

### DECISIONS UNDER ARTICLE 2013 B.

Where a privilege both by the law as it previously existed and by the amending Act is made to depend upon and date from its registration, the effects of the registration of such privilege after the coming into force of the amended statute are governed by the provisions thereof. Therefore, the prescription applicable to a builder's privilege registered after the coming into force of the amended statute, 59 Vict. (Q.) ch. 42, is that of one year from the date of the registration.

In order to obtain the hypothecary privilege of a supplier of material under this article, the memorial or *bordereau* registered must state the cost of the materials furnished, apart from the cost of the work done.

The fact that subsequently to the registration of a builder's privilege, the person registering the same accepted notes for his claim from the debtor and agreed to have the same renewed for a term of three years, has not the effect of altering the conditions of the privilege or prolonging its existence beyond the period fixed by law. Doherty, J., *City of Montreal v. Lafebvre*, (1898) R.J.Q. 14 S.C. 473. This judgment was confirmed in the Court of Queen's Bench in Appeal, and is reported, R.J.Q. 19 Q.B. 282. And the judgment of the Court of Queen's Bench in Appeal was confirmed by the Privy Council. Lord McNaghten, who delivered the judgment, remarked that “their Lordships entirely concurred in the judgment of the Court of Queen's Bench delivered by Lacoste, C.J., who adopted the reasoning of the Superior Court.” *La Banque d'Hochelaga v. Stevenson*, (1900) A.C.600.

The thirty days provided for registry of the lien of a laborer, workman or contractor, are computed from the time when the construction of the building on which they have worked is ended, and not from the date on which it was first used. *Quintal v. Bernard*, (1901) 20 S.C. 199.

See also *La Banque Jacques Cartier v. Picard*, (1900) Langehier, J., 18 S.C. 502.

The registration of a builder's privilege, for work done at the request of a person owning an immovable subject to a resolutive condition entitling the vendor to demand the dissolution of the sale by reason of failure to pay the price, ceases to have any effect after the vendor has taken back the property under the condition. *La Tour v. L'Heureux*, (1900) 16 Que. S.C. 485.

“2013 C.—The preservation of the privilege is subject to the following conditions: —

“The laborer and workman must give notice in writing, or verbally before a witness, to the proprietor of the immovable, that they have not been paid for their work, at and for each term of payment, due to them.”

“Such notice may be given by one of the employees in the name of all the other laborers or workmen who are not paid, but in such cases the notice must be in writing.”

“The architect and builder shall likewise inform the proprietor of the immovable, or his agents, in writing, of the contracts which they have made with the chief contractor, within eight days from the signing of the same.”

#### DECISIONS UNDER ARTICLE 2013 C.

The right of privilege is a strict right resulting from the law, and whoever claims a privilege should scrupulously observe the formalities prescribed by the law creating it.

The workman who claims a lien for his wages should inform the owner of the estate that he has not been paid for his work “to and for each term of payment which is due him,” and should give such notice at once on the expiration of the term; notice given six days after the expiration of the term, and when the owner had settled with his contractor is insufficient to preserve the lien of the workman. The knowledge the owner should have of the workman having been employed by his contractor cannot take the place of the notice required by law. *Wells v. Newman*, (1897) De Lorimier, J., 12 S.C. 216.

## ARTICLE 2013 D.

“**2013 D.**—In order to meet the privileged claims of the laborer and workman, the proprietor of the immovable may retain an amount equal to that which he has paid or will be called upon to pay, according to the notices he has received, so long as such claims remain unpaid.”

## ARTICLE 2013 E.

“**2013 E.**—In the event of a difference of opinion between the creditor and the debtor, with respect to the amount due, the creditor shall, without delay, inform the proprietor of the immovable, by means of a written notice, which shall also mention the name of the creditor, the name of the debtor, the amount claimed, and the nature of the claim.”

“The proprietor then retains the amount in dispute until notified of an amicable settlement or a judicial decision.”

## ARTICLE 2013 F.

“**2013 F.**—The sale to a third party by the proprietor of the immovable or his agents, or the payment of the whole or a portion of the contract price, cannot in any way affect the claims of persons who have a privilege under Article 2013, and who have complied with the requirements of Articles 2013 A., 2013 B 2013 C and 2103.”

## ARTICLE 2013 G.

“**2013 G.**—The supplier of materials shall, before delivery of the materials, give notice in writing to the proprietor of the immovable, of contracts made by him for the delivery of materials, and mention the cost thereof, and the immovable for which they are intended.”

## DECISIONS UNDER ARTICLE 2013 G.

Where a privilege, both by the pre-existing law and by the statute amending the same, is made to depend upon and to date from its registration, the effects of the registration of such privilege effected only after the coming into force of the amending statute are governed, as to the duration of the privilege and the time by which it is prescribed, by the provisions of the amending Act; consequently the prescription applicable to a builder's privilege which was only registered after the coming into force of the amending Act, 59 Vict. (Q.) ch. 42, is that of one year from the date of the registration, although the work for which the privilege was sought was done before the amending Act came into force.

In order to obtain the hypothecary privilege of a supplier of materials under Art. 2013(1) of the Code, the formalities prescribed by law, as to notice to the proprietor, must be complied with, and the memorial or *bordereau* mentioned in Article 2013 C.C., must state the cost of the materials furnished. *La Banque d'Hochelaga v. Stevenson*, 9 Que. Q.B. 282.

Held, affirming the above decision, on appeal to the Judicial Committee of the Privy Council, that under the Quebec Civil Code, as amended by 59 Vict. ch. 42, a builder's privilege is limited to one year from the date of registration thereof; and with regard to an hypothecary privilege conferred on suppliers of materials, it only arises on notice being given to the proprietor under Art. 2013 G and registered under Art. 2103, and lapses unless the prescribed legal proceedings are taken within three months from the date of notice. *La Banque d'Hochelaga v. Stevenson*, R.J.Q. 9 Q.B. 282; (1900) A.C. 600.

An action in which a material man claims from the contractor the price of materials furnished by him, and asks against the owner of the land upon which buildings have been erected with the plaintiff's materials that the land shall be declared to be charged with the amount of the plaintiff's claim unless the owner prefers to pay the price of the materials, will be dismissed upon demurrer by the owner if it does not appear that the plaintiff has begun his action within the three months following the notice mentioned in Art. 2013 (g), C.C. *McLaren v. Loyer*, (1901) 3 Q.P.R. 60; 20 C.L.T. 277.

See also *Paquette v. Mayer*, (1900) 18 S.C. 563, cited *ante*, under Article 2013, and *Montmorency Cotton Mills Co. v. Gignac*, (1901) 10 Que. Q.B. 158, cited *ante*, under Article 2013. See also *Charpenter v. Lapointe*, (1901) 7 R. de J. 92 (Pagnuelo, J.), and *Harris v. Charbonneau*, (1901) 7 R. de J. 119, R.J.Q. 25 S.C. 180 (Pagnuelo, J.).

#### ARTICLE 2013 H.

“**2013 H.**—In order to meet the privileged claims of the *suppliers of materials*, the proprietor of the immovable retains, on the contract price, an amount equal to that mentioned in the notices he has received.”

#### ARTICLE 2013 I.

“**2013 I.**—The notices mentioned in Article 2013 G have the effect of an attachment by garnishment on the contract price.

“Within the three months following the notice given in accordance with Article 2013 G, the interested parties must take legal proceedings to have the debtor condemned and the seizure declared valid, otherwise the latter lapses; and, to such suit, the proprietor of the immovable must be made a party.”

#### ARTICLE 2013 J.

“**2013 J.**—In the event of the proprietor of the immovable erecting the building himself without the intermediary of any contractor, the notices mentioned in Article 2013 G may be given to the person or persons who lend or may lend money to the person building, and thereupon the latter shall, *mutatis mutandis*, be subject to the provisions of the preceding articles.

#### ARTICLE 2013 K.

“**2013 K.**—No transfer of any portion of the contract price or of the amount borrowed, as the case may be, either before or during the execution of the work, can be set up against the said



suppliers of materials, nor can any payment, exceeding the cost of the work done, according to a certificate of the architect or superintendent of the works, affect their rights."

### DECISIONS UNDER ARTICLE 2013 K.

A valid privilege may be obtained by registration of a claim for building materials furnished, although the person to whom they were furnished was in possession of the land only under an unregistered conditional promise of sale, and the registration of the privilege was made only with such formalities as would be sufficient if he had been the absolute owner; but upon violation of the conditions and the determination of the right of the conditional purchaser to obtain a title, the privilege in question, as well as all acts depending upon a right of property in the conditional purchaser becomes null and void; and therefore the property cannot be seized and brought to sale under a judgment against the latter, to which the conditional vendor was not a party. *Metivier v. Wand*, (1898) Q.R. 13 S.C. 445. (Archibald, J.)

### ARTICLE 2013 L.

"2013 L.—On notice given to the proprietor in virtue of Article 2013 G, and registered according to Article 2013, the suppliers of materials shall have a hypothecary privilege which shall rank after the hypothecs previously registered and the privileges created by this Act."

### DECISIONS UNDER ARTICLE 2013 L.

Although the right of suppliers of materials is called in Article 2013 L in the French version "un droit d'hypothèque," and in the English version "a hypothecary privilege," the right is nevertheless of the nature of a privilege and not of the nature of a hypothec, and all suppliers for the same building who have availed themselves of the privileges of the article and registered their claims, rank concurrently. *Jamieson v. Charbonneau*, 17 Que. S.C. 514. (Archibald, J.)

See also *City of Montreal v. Lefebvre*, (1898) R.J.Q. 14 S.C. 473 (Doherty, J.), and reference to decision of that case, *sub nom. La Banque d'Hochelaga v. Stevenson*, under Article 2013 G.

See also *MacLaren & Villeneuve*, (1900) R.J.Q. 11 Q.B. 131, *contra* Court of Review, 1889; *Lalonde v. LaBelle*, R.J.Q. 16 S.C. 573, cited *ante*, under Article 2013.

On the subject of *payment* of workmen and in connection with it, reference might be had to Articles 1697 A to 1697 D of the Civil Code, both inclusive. These four articles refer to the payment of workmen employed by builders or contractors and the manner in which they may secure their claim by giving notices to the proprietor of the land.

## REGISTRATION OF PRIVILEGE OF BUILDERS, ETC.

### CIVIL CODE 2103.

“**2103.**—The privilege of the persons mentioned in Article 2013 dates, in the cases mentioned in the first clause of Article 2013 B, only from the registration, within the proper delay, at the registry office of the division in which is situated the immovable affected by the inscription, of a notice or memorial, drawn up according to form A, with a deposition of the creditor, sworn to before a justice of the peace or a commissioner of the Superior Court, setting forth the nature and amount of the claim, and describing the immovable so affected.”

“(2) In registering such memorial, it is sufficient to mention, opposite the official number of the *cadastre* which describes the immovable, if the *cadastre* be deposited, or opposite the title of the registered deed, if the *cadastre* be not yet deposited, the name of the claimant and the amount due at the time the memorial is filed.”

“(3) The memorial shall be made out in duplicate, one copy of which shall remain in the archives of the registry office, and the other be delivered to the creditor with the registrar's certificate thereon.”

“(4) The creditor shall, within three days from the registration of the memorial, give a written notice to the proprietor of the immovable, or to his agents, if he cannot be found.”

### DECISIONS UNDER ARTICLES 2103 AND 2168.

See *Doutre v. Greene*, cited under Article 2013.

In Quebec, Article 2168 of the Civil Code must be strictly complied with in respect to the description of an “immovable” in the notice for registration of a workman’s “privilege.” A description as part of lot 4101 of the *cadastre* of the Parish of Montreal, omitting the conterminous properties, does not comply with said article, which provides that in any place where the official plans are in force the true description of a part of a lot is by stating that it is part of a certain official number upon the plan and in the book of reference, and mentioning who is the owner and the properties conterminous thereto. Such notice, therefore, did not create any privilege. *Therien v. Henault*, (1902) 21 S.C. 452.

A builder is without privilege on the proceeds of real estate, if he has not complied with the formalities prescribed by 4 Vict. ch. 30, secs. 31 and 32 (C.S.L.C. 352-3), requiring a *procès-verbal* to be made before the work is begun; establishing the state of the premises in regard to the work about to be made; requiring also a second *procès-verbal* within six months after the completion of the work, establishing the increased value of the premises; requiring also that the second *procès-verbal*, establishing the acceptance of the work, be registered within thirty days from the date of such second *procès-verbal*, in order to secure such privilege: *Berthelot, J.*, 1861, *Clapin v. Nagle*, 6 L.C.J. 196; 10 R.J. R.Q. 271; R.J.Q. 1 C.B. 332.

The person who has advanced moneys for the construction of a division wall between him and his neighbor cannot claim a privilege when the neighboring property is sold by the sheriff as against the hypothecary creditors of said land, if he have not observed the formalities required by the registry ordinance, C.S.L. C., ch. 37, sec. 26, sub-sec. 4, even though the value of the land has been augmented by the construction of the wall. 1863, *Taschereau, J.*, *Stillings v. McGillis*, 14 L.C.R. 129; 12 R.J.R.Q. 342; R.J.Q. 1 Q.B. 332.

The possessor in good faith who has put up buildings on the land of another is not held, in order to be paid for his work, to establish that he has complied with the requirements of Articles 2103 and 2103 of the Civil Code. These articles apply only to the builder or other workmen who puts up buildings for the owner of the land under a contract with the proprietor. 1904, Gagne, J., *Chinic Hardware Company v. Laurent*, 1 R. de J. 278; 1892, Supr. Court of Canada, *Dufresne & Prefontaine*, 21 S.C.R. 607; 16 L.N. 48. See also the case of *Daniel v. Macduff*, cited under Article 2103 of the Civil Code.

At different times in recent years essays have appeared in law periodicals on this subject in the Province of Quebec, and among these the more notable, perhaps, are those written by Mr. Baker, Advocate, 1 Rev. Leg. N.S., page 281, by Mr. Belanger, Notary, in the same volume, page 376, by Mr. Baudion, Notary, 6 Rev. Leg. N.S., 273, and by Mr. Lafontaine, K.C., in the second volume of *La Thémis*, page 161.

The whole subject has been treated by Mr. Pelissier, K.C., of the Quebec Bar in a short treatise entitled "*Architectes et Entrepreneurs*."

The law as stated in Articles 2103 to 2103 K has been in force since January, 1894. It is said to be doubtful whether the large class of workmen and builders, whom it was intended to benefit, derive any substantial advantage from it. Some legal writers in Quebec do not regard this law as beneficial, and point out that in a country like ours, still comparatively new and requiring capital from abroad, everything that diminishes the security offered to an intending lender necessarily makes it more difficult for the proprietor of land to borrow. He may have thousands of dollars of land value to offer, but, as the lender will naturally require a first mortgage, applications for loans will frequently be refused because the capitalist sometimes considers that a first mortgage cannot secure him with certainty, since builders, contractors, architects and workmen will be privileged for their claims in preference to his.

The difficulty is frequently overcome by waiting until thirty days after the completion of the buildings, but this delay is in itself an objection, hampers business and delays loans.

It is claimed that this legislation has sometimes stood in the way of loans on vacant real estate, and thus prevented building



operations and, therefore, there is a difference of opinion in the Province of Quebec in respect to the beneficial effect of the present law in its relation to builders, contractors, architects and workmen. In the other Provinces of Canada, while there was formerly considerable difference of opinion as to the advantage of mechanics' lien legislation, there is to-day, as a result of important amendments to the original legislation, general satisfaction with the present legislation, which is regarded on the whole as decidedly beneficial to the classes for whom it was specially intended. See observations in Chapter I., at p. 8.

### LIEN OF WORKMEN ON MOVABLE PROPERTY.

The workman by the law of Quebec has a secured right of retention in the thing which he has improved by his work, or a right to be paid by privilege out of the price. The Civil Code contains several articles dealing with these rights.

In some cases there is more than a right of retention or of privilege. For instance, a right of ownership is recognized in the workman who has been provided with materials by his employer in some cases and these cases, as stated in Article 429 of the Code, are entirely subordinate to the principles of natural equity. The Code then proceeds to enumerate a set of rules which are obligatory in the cases where they apply, and serve as examples for cases not provided for according to circumstances. The first of these rules is contained in Art. 430 of the Code, which reads as follows:—

“**430.**—When two things belonging to different owners have been united so as to form a whole, although they are separable and one can subsist without the other, the whole belongs to the owner of the thing which forms the principal part, subject to the obligation of paying the value of the other thing, to him to whom it belonged.”

And the Commentators of the corresponding Article of the Code Napoléon lay it down that *a fortiori* the principle of Article 430 is to apply when the things are not separable without inconvenience or cannot be separated at all.



“431.—That part is reputed to be the principal one to which the other has been united only for the use, ornament or completion of the former.”

The text of the Article 567 of the Code Napoléon is similar to Article 431 of the Civil Code of Quebec, and the French commentators agree that where a person has written, printed, painted or engraved on paper, linen or other material not belonging to him, the proprietor of the material would only have a right to his material or to damages where there were any.

The next rule depends on the relative value of the things united together.

“432.—However, when the thing united is much more valuable than the principal thing, and has been employed without the knowledge of its owner, he may require that the thing so united be separated in order to be returned to him, although the thing to which it has been joined may thereby suffer some injury.”

Article 433 deals with a case where it is impossible to say which is principal or which is accessory.

“433.—If of two things united so as to form a whole, one cannot be considered as the accessory of the other, the more valuable, or, if the values be nearly equal, the more considerable in bulk is deemed to be the principal.”

“434.—If an artisan or any other person have made use of any material which did not belong to him to form a thing of a new description, whether the material can resume its previous form or not, he who was the owner of it has a right to demand the thing so formed, on paying the price of the workmanship.”

#### DECISIONS UNDER ARTICLE 434.

Workmen and laborers in a quarry have no privilege on the tools serving in the work nor on a stone taken out of the quarry and cut, especially when the tools and this stone did not belong to the man who employed the workman: 1878, Court of Review,

*Prevost v. Wilson*, 22 L.C.J. 70, 1 L.N. 232. (The other decisions under this Article relate to the cutting of wood or trees on land of another, without authority, and do not come within the purposes of this compilation.)

#### ARTICLE 440 OF THE CODE.

“440.—In all cases where a proprietor whose material has been employed without his consent, to make a thing of a different description, may claim the proprietorship of such thing, he has the choice of demanding the restitution of his material in the same kind, quantity, weight, measure and quality, or its value.”

#### ARTICLE 441 OF THE CODE.

“441.—Whoever is bound to give back a movable object upon which he has made improvements or additions for which he is entitled to be reimbursed, may retain such object until he has been so reimbursed, without prejudice to his personal remedy.”

The workman, who has made improvements to a movable thing for which improvements he has a right to be reimbursed, may retain the object until he has been reimbursed and he has in the thing a right of pledge. The person who so retains a thing for improvements made by him may, as pledgee, oppose the sale of the thing retained or pledged: *Belleau v. Pitou*, (1887) 13 Q.L.R. 337, 11 L.N. 86 (Cassault, J.).

The printer has a lien on manuscript given him to be printed, for the costs of the printing: *Dussault v. Fortin*, (1893) R.J.Q., 4 S.C. 304 (Andrews, J.).

“1993.—Privileges may be upon the whole of the movable property, or upon certain movable property only.”

“1994.—The claims which carry a privilege upon movable property are the following, and where several of them come together they take precedence in the following order, and accord-

ing to the rules hereinafter declared, unless some special law derogates therefrom.”

“1. Law costs and all expenses incurred in the interest of the mass of the creditors;

“2. Tithes;

“3. The claims of the vendor;

“4. The claims of creditors who have a right of pledge or of retention;

“5. Funeral expenses;

“6. The expenses of the last illness;

“7. Municipal taxes;

“8. The claim of the lessor in accordance with Article 2005;

“8a. The claim of the owner of a thing lent, leased, pledged or stolen, in accordance with Article 2005 A;

“9. Servants’ wages and those of employees of railway companies engaged in manual labor, and sums due for supplies of provisions;

“10. The claims of the Crown against persons accountable for its moneys;

“The privileges specified under the numbers 5, 6, 7, 9 and 10 extend to all the movable property of the debtor, the others are special, and affect only some particular objects.”

#### ARTICLE 2001 OF THE CODE.

“2001.—Creditors having a right of pledge or of retention rank according to the nature of their pledge or of their claim.

“The following is the order among them:—

“Carriers;

“Hotel keepers;

“Mandataries or consignees;

“Borrowers in loan for use;

“Depositaries;

“Pledgees;

“Workmen upon things repaired by them, and persons having a privilege in virtue of Article 1994 C;

“Purchasers against whom the right of redemption is exercised, for the reimbursement of the price and the moneys laid out upon the property;

“This privilege cannot, however, be exercised, unless the right is still subsisting, or could have been claimed at the time of the seizure, if the things have been sold.”

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## APPENDIX "A."

THE LIEN LAW OF NEW YORK, CHAPTER 418, LAWS  
1897.AN ACT IN RELATION TO LIENS, CONSTITUTING CHAPTER 49 OF  
THE GENERAL LAWS.

## ARTICLE 1.

## MECHANICS' LIENS.

1. **Short title.**—This chapter shall be known as the lien law.

2. **Definitions.**—The term "lienor," when used in this chapter, means any person having a lien upon property by virtue of its provisions, and includes his successor in interest. The term "real property," when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right or franchise granted by a municipal corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise. The term "owner," when so used, includes the owner in fee of real property, or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property, which may be sold under an execution in pur-



suance of the provisions of statutes relating to the enforcement of liens of judgment, and all persons having any right or franchise granted by a municipal corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise.

The purchaser of real property at a statutory or judicial sale shall be deemed the owner thereof, from the time of such sale. If the purchaser at such sale fails to complete the purchase, pursuant to the terms of the sale, all liens created by his consent after such sale shall be a lien on any deposit made by him and not on the real property sold. The term "improvement," when so used, includes the erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property, or materials furnished for its permanent improvement. The term "public improvement," when so used, means an improvement upon any real property belonging to the State or a municipal corporation. The term "contractor," when so used, means a person who enters into a contract with the owner of real property for the improvement thereof. The term "sub-contractor," when so used, means a person who enters into a contract for the improvement of such real property with a contractor, or with a person who has contracted with or through such contractor, for the performance of his contract or any part thereof. The term "laborer," when so used, means any person who performs labor or services upon such improvement. The term "material man," when so used, means any person, other than a contractor, who furnishes material for such improvement.

**3. Mechanics' lien on real property.**—A contractor, sub-contractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or

materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article.

**4. Extent of lien.**—Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to, a contractor or sub-contractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

**5. Liens under contracts for public improvements.**—A person performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement pursuant to a contract by such contractor with the state or municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien as prescribed in this article.

**6. Liens for labor on railroads.**—Any person who shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of any county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing. The provisions of this article relating to the contents, filing and entry of a notice of a mechanics' lien, and the priority and duration thereof, shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner prescribed by the Code of Civil Procedure for the service of summons in actions in justices' courts against domestic railroad corporations.

**7. Liability of owner for advance payments, collusive mortgages and incumbrances.**—Any payment by the owner to a contractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a sub-contractor, laborer or material man under such contract, created before such payment actually becomes due. A mortgage, lien or incumbrance made by an owner of real property, for the purpose of avoiding the provisions of this article, with the knowledge or privity of the person in whose favor the mortgage, lien or incumbrance is created, shall be void and of no effect as against a claim on account of the improvement of such real property, existing at the time of the creation of such mortgage, lien or incumbrance.

**8. Terms of contract may be demanded.**—A statement of the terms of a contract pursuant to which an improvement of real

property is being made, and of the amount due or to become due thereon, shall be furnished upon demand, by the owner, or his duly authorized agent, to a sub-contractor, laborer or material man performing labor for or furnishing materials to a contractor, his agent or sub-contractor, under such contract. If, upon such demand the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon, and a sub-contractor, laborer or material man has not been paid the amount of his claim against a contractor or sub-contractor, under such contract, and a judgment has been obtained and execution issued against such contractor or sub-contractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such sub-contractor, laborer or material man, filed as prescribed in this article, against the real property improved for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner.

**9. Contents of notice of lien.**—The notice of lien shall state:

1. The name and residence of the lienor.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or if the lienor is a contractor or sub-contractor, the person with whom the contract was made.

4. The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a mis-description of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

**10. Filing of notice.**—The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within ninety days after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

**11. Service of copy of notice.**—At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the



owner, by delivering the same to him personally, or if the owner cannot be found, to his agent, or attorney, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered letter addressed to his last known place of residence, or, if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien.

**12. Notice of lien on account of public improvements.**—At any time before the construction of a public improvement is completed and accepted by the municipal corporation, and within thirty days after such completion and acceptance, a person performing work for or furnishing materials to a contractor, his sub-contractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction and with the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursements of the corporate funds applicable to the contract under which the claim is made. The notice shall state the name and residence of the lienor, the name of the contractor or sub-contractor for whom the labor was performed or materials furnished, the amount claimed to be due or to become due, the date when due, a description of the public improvement upon which the labor was performed and materials expended, the kind of labor performed and materials furnished and give a general description of the contract pursuant to which such public improvement was constructed. If the name of the contractor or sub-contractor is not known to the lienor, it may be so stated in the notice, and a failure to state correctly the name of the con-

tractor or sub-contractor shall not affect the validity of the lien. The financial officer of the municipal corporation or other officer or person with whom the notice is filed shall enter the same in a book provided for that purpose, to be called the "lien book." Such entry shall include the name and residence of the lienor, the name of the contractor or sub-contractor, the amount of the lien and date of filing, and a brief designation of the contract under which the lien arose.

**13. Priority of liens.**—A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of filing the notice of such lien; over advances made upon any mortgage or other incumbrance thereon, after such filing; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of such notice. Such lien shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successors or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used. Persons standing in equal degrees as co-laborers or material men, shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference to the time when such laborers shall have filed their notices of claims.

**14. Assignment of lien.**—A lien, filed as prescribed in this article, may be assigned by a written instrument signed and acknowledged by the lienor, at any time before the discharge thereof. Such assignment shall contain the names and places of residence of the assignor and assignee, the amount of the lien and the date of filing the notice of lien, and be filed in the office where the notice of the lien assigned is filed. The facts relating to such an assignment and the names of the assignee shall be entered by the proper officer in the book where the notice of lien is entered and opposite the entry thereof. Unless such assignment is filed, the assignee may not be made a defendant in an action to foreclose a mortgage, lien or other incumbrance. A payment made by the owner of the real property subject to the lien assigned or by his agent or contractor, or by the contractor of a municipal corporation, to the original lienor, on account of such lien, without notice of such assignment and before the same is filed, shall be valid and of full force and effect. Except as prescribed herein, the validity of an assignment of a lien shall not be affected by a failure to file the same.

**15. Assignments of contracts and orders to be filed.**—No assignment of a contract for the performance of labor or the furnishing of materials for the improvement of real property or of the money or any part thereof due or to become due therefor, nor any order drawn by a contractor or sub-contractor upon the owner of such real property for the payment of such money shall be valid, until the contract or a statement containing the substance thereof and such assignment or a copy of each or a copy of such order, be filed in the office of the county clerk of the county wherein the real property improved or to be improved is situated, and such contract, assignment or order shall have effect and be enforceable from the time of such filing. Such clerk shall enter the facts relating to such assignment or order in the "lien docket," or in another book provided by him for such purpose.

**16. Duration of lien.**—No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an order be granted within one year from the filing of such notice by a court of record, continuing such lien, and such lien shall be re-docketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person.

**17. Duration of lien under contract for a public improvement.**—If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than three months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the financial officer of the municipal corporation, with whom the notice of lien was filed.

**18. Discharge of lien generally.**—A lien other than a lien for



labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

1. By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied and may be discharged.

2. By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien.

3. By order of the court vacating or cancelling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to the Code of Civil Procedure.

4. Either before or after the beginning of an action by the owner executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the clerk of the county where the premises are situated, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice, an order shall be made discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this State to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto resolution of its board of directors, a



certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking.

**19. Discharge of lien by payment of money into court.**—A lien specified in this article, other than a lien for performing labor or furnishing materials for a public improvement, may be discharged, at any time before an action is commenced to foreclose such lien, by depositing with the county clerk, in whose office the notice of lien is filed, a sum of money equal to the amount claimed in such notice, with interest to the time of such deposit. After such action is commenced the lien may be discharged by a payment into court of such sum of money, as, in the judgment of the court or a judge or justice thereof, after at least five days' notice to all the parties to the action, will be sufficient to pay any judgment which may be recovered in such action. Upon any such payment, the county clerk shall forthwith enter upon the lien docket and against the lien for the discharge of which such moneys were paid, the words "discharged by payment." A deposit of money made as prescribed in this section shall be repaid to the party making the deposit, or his successor, upon the discharge of the liens against the property pursuant to law. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of the Code of Civil Procedure relative to the payment of money into court and the surrender of such money by order of the court. An order for the surrender of such moneys may be made by any court of record having jurisdiction of the parties and of the subject matter of the proceeding for the foreclosure of the lien for the discharge of which such moneys were deposited. If no action is brought in a court of record to enforce such lien, such order may be made by any judge of a court of record.

**20. Discharge of lien for public improvement.**—A lien against the amount due or to become due a contractor from a municipal

corporation for the construction of a public improvement may be discharged as follows:—

1. By filing a certificate of the lienor or his successor in interest, duly acknowledged and proved, stating that the lien is discharged.

2. By lapse of time, when three months have elapsed since filing the notice of lien, and no action has been commenced to enforce the lien.

3. By satisfaction of a judgment rendered in an action to enforce the lien.

4. By the contractor depositing with the financial officer of the municipal corporation, or the officer or person with whom the notice of lien is filed, such a sum of money as is directed by a justice of the Supreme Court, which shall not be less than the amount claimed by the lienor, with interest thereon for the term of one year from the time of making such deposit, and such additional amount as the justice deems sufficient to cover all costs and expenses. The amount so deposited shall remain with such financial officer or other officer or person until the lien is discharged as prescribed in subdivisions one, two or three of this section.

**21. Building loan contract.**—A contract for the sale of land with a building loan and any modification thereof, must be in writing, and within ten days after its execution be filed in the office of the clerk of the county in which any part of the land is situated. If not so filed, the interest of each party to such contract in the real property affected thereby, is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter. A modification of such contract shall not affect or impair the right or interest of a person, who, previous to the filing of such modification had furnished or contracted to furnish materials, or had performed or contracted to perform labor for the improvement of the real property, but such right

or interest shall be determined by the original contract. The county clerk is entitled to a fee of twenty-five cents for filing such a contract or modification. Such contracts and modifications thereof shall be indexed in a book provided for that purpose, in the alphabetical order of the names of the vendees.

**22. Construction of article.**—This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the court to enforce the same.

**23. Enforcement of mechanics' liens.**—The mechanics' liens specified in this article may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded. The Code of Civil Procedure regulates and provides for such enforcement.

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## APPENDIX "B."

### THE MASSACHUSETTS LAW (R.L. ch. 197).

1. A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, repair or removal of a building or structure upon land, by virtue of an agreement with or by consent of the owner of such building or structure or of a person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials, shall, subject to the provisions of this chapter, have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated to secure the payment of the debt so due to him and of the costs of enforcing such lien.

2. If such agreement is for labor performed or furnished and for materials furnished under an entire contract and for an entire price, a lien for the labor alone may be enforced if the value of such labor can be distinctly shown; but it shall not be enforced for an amount greater than the entire contract price.

3. The lien shall not attach for materials unless the person who furnishes them, before so doing, gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such materials, that he intends to claim such lien.

4. If the owner of a building or structure which is in process of erection, alteration, repair or removal is a person other than the party by whom or in whose behalf a contract for labor and materials has been made, he may prevent the attaching of a lien for labor not then performed, or for materials not then furnished, by giving notice in writing to the person who performs or fur-

nishes such labor or furnishes such materials, that he will not be responsible therefor.

5. The lien shall not avail against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed.

6. The lien shall be dissolved unless the person claiming it, within thirty days after he ceased to labor on or to furnish labor or materials for the building or structure, files in the registry of deeds for the county or district in which it is situated a statement signed and sworn to by him or a person in his behalf, giving a just and true account of the amount due him, with all just credits, a description of the property intended to be covered by the lien sufficiently accurate for identification and the name of the owner or owners of such property, if known. If a lien is claimed for labor only performed or furnished under an entire contract which includes both labor and materials at an entire price, the contract price, the number of days of labor performed or furnished and the value of the same shall also be stated. The statement shall not be invalid or insufficient solely by reason of an inaccuracy in stating or failing to state the contract price, the number of days of labor performed or furnished, and the value of the same, if it is shown that there was no intention to mislead and that the parties entitled to notice of the statement were not in fact misled thereby.

7. The validity of the lien shall not be affected by an inaccuracy in the statement relative to the property to which it attaches, if such property can be reasonably recognized from the description, nor by an inaccuracy in stating the amount due for labor or materials, unless it is shown that the person filing the statement has wilfully and knowingly claimed more than is due to him.

8. The statement shall remain in the custody of the registrar and be open to public inspection. He shall record it in a book to be kept for the purpose, but the items of the account, except



the total amount claimed to be due, may be omitted from the record.

9. The lien shall be dissolved unless a petition to enforce it is filed within ninety days after the person claiming it has ceased to perform labor on or to furnish labor or materials for the building or structure. The petition shall contain a brief statement of the contract on which it is founded and of the amount due thereon, a description of the premises subject to the lien and all other material facts and circumstances, and shall pray that the premises may be sold and the proceeds of the sale applied to the discharge of the debt. The date of the filing of the petition shall be the commencement of the proceeding to enforce the lien.

10. The superior court for the county in which the building or structure is situated shall have jurisdiction to enforce liens under the provisions of this chapter; but if the building or structure affected by the lien is situated within their respective jurisdictions, a trial justice shall have original and concurrent jurisdiction with the superior court if the amount claimed does not exceed three hundred dollars, a police, district or municipal court, except the municipal court of the city of Boston, shall have like jurisdiction if the amount claimed does not exceed one thousand dollars, and the municipal court of the city of Boston shall have like jurisdiction if the amount claimed does not exceed two thousand dollars. The parties shall have like rights of appeal as in other civil cases.

11. If two or more persons have actually performed labor on or furnished labor or materials for one or more buildings or structures upon different lots of land for the same owner, contractor or other person, they may join in one petition to enforce their respective liens; and the proceedings shall be the same; and the respondent may defend as to each petitioner, as if each petitioner had filed a separate petition.

12. The court or justice shall issue a precept to an officer qualified to serve civil process, commanding him to summon the

owner of the building or structure to appear and answer said petition and to give notice of the filing of said petition to the debtor, if he is not the owner of the building or structure, and to all creditors who have a lien of the same kind upon the same estate. Such precept shall be in substance as follows.—

Commonwealth of Massachusetts.

[L.S.] To the sheriffs of our several counties or their deputies, [or to any constable of the city or town of \_\_\_\_\_ in said county] greeting.

We command you to summon \_\_\_\_\_, the alleged owner of a certain building or structure on real estate [description] to appear before \_\_\_\_\_ court at \_\_\_\_\_ within [and for] our said county of \_\_\_\_\_ on \_\_\_\_\_ then and there in our said court to answer unto a petition for lien which \_\_\_\_\_ hath filed in said court to enforce a lien upon said building or structure and the interest of said alleged owner in the lot of land upon which the same is situated to secure payment of a debt amounting to \_\_\_\_\_ dollars and \_\_\_\_\_ cents alleged to be due said petitioner [for labor performed on said building or structure, or for labor furnished, or for materials furnished and actually used on said building or structure, *as the case may be*] and the costs which may accrue in enforcing such lien.

And we further command you to notify \_\_\_\_\_, the debtor in said petition mentioned and all creditors other than the petitioner having liens of the same kind upon the same estate that said petition has been filed in our said court.

And have you there this precept with your doings therein.

Witness \_\_\_\_\_ Esquire, at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and \_\_\_\_\_.  
[Clerk or Justice.]

An attested copy of such precept shall be served upon said owner, debtor and each of said creditors and shall be posted upon said building or structure fourteen days at least before the return day thereof. The fees of the officer shall be fifty cents for

each person upon whom service is made and thirty cents for each copy, with fees for travel as in the service of other civil process. If the petition is filed in a police, district or municipal court or before a trial justice, the day for the appearance and answer shall be fixed at not more than sixty days from the day of entry.

13. If the court or justice finds that a person who is entitled to notice is absent from the commonwealth, or that it is probable that he cannot be found to be served with the precept or notice, the petition shall be continued until such notice as the court or justice orders has been given. If, at the time assigned for the hearing, it appears that a person interested has not had sufficient notice of the petition, the court may order further notice.

14. A creditor who has a lien under the provisions of this chapter upon the same property may appear and prove his claim, and the owner and each creditor may contest the claim of any other creditor. The court may allow amendments to the pleadings as in actions at law.

15. The court shall determine all claims in a summary manner, but every material question of fact arising in the case in the Superior Court shall be tried by a jury, if such trial is required by a party or is ordered by the court upon a question stated, upon an issue framed or otherwise, as the court may order.

16. A claim due absolutely and without condition, although not payable at the time of determination, shall be allowed with a rebate of interest to the time when it would become payable. If the owner has failed to perform his part of the contract and by reason of such failure the other party is without his own default prevented from completely performing his part thereof, he shall be entitled to a reasonable compensation for as much as he has performed, in proportion to the price stipulated for the whole.

17. If a lien is established the court shall order a sale of the property to be made by an officer qualified to serve civil process.

The court may order a sale of a part of the property sufficient to satisfy the claims allowed, if such part can be set off from the residue and sold without damage to the whole.

18. The officer shall give notice of the time and place of sale as provided for sales of land on execution or as ordered by the court.

19. An interest in land which is sold under the provisions of this chapter may be redeemed, as provided for sales of land on execution.

20. If all the claims against the property covered by the lien were ascertained at the time of ordering the sale, and if the proceeds of the sale are sufficient therefor, the court may order the officer to distribute them, after deducting all lawful charges and expenses, to and among the several creditors to the amount of their respective debts, with interest, or, if insufficient, to distribute the same among the creditors in proportion to the amount due to each. If all the claims were not ascertained at the time of ordering the sale or other sufficient cause is shown, the court may order the officer to bring the proceeds of the sale into court to be disposed of according to its decree. If the whole cannot be conveniently distributed at one time, the court may make successive orders of distribution. If there is a surplus of the proceeds of the sale after making all the payments before mentioned, it shall be paid over to the owner of the property; but, before it is so paid over, it may be attached or taken on execution in like manner as proceeds from a sale on execution.

21. The costs shall, except as herein otherwise provided, be in the discretion of the court, and shall be paid from the proceeds of the sale or by any of the parties, as it may order.

22. If the person for whom the labor has been performed or furnished or the materials have been furnished dies or conveys away his estate or interest before the filing of the petition, it may be filed and prosecuted against his heirs or against the persons

holding the estate or interest which he had in the land at the time when the labor or materials were performed or furnished. If the petition was filed in the lifetime of such person, it may be prosecuted against his executor, administrator, heirs or assigns, as if the estate or interest had been mortgaged to secure the debt.

23. If a creditor dies without having filed such petition, it may be filed and prosecuted by his executor or administrator; or if he dies after having filed it, it may be so prosecuted.

24. If the petition was filed by the creditor before his right of action accrued or after it was barred, or if he becomes nonsuit or fails to establish his claim, it may be prosecuted by any other creditor having such lien, who, at or after the time of filing the original petition, might have filed a like petition on his own claim. If the petition was filed by the creditor before his right of action accrued and it is so prosecuted by such other creditor, the claims of the petitioning creditor may be allowed, but he shall not recover costs, and the court may order him to pay a part or the whole of the costs of the debtor.

25. If the interest of the owner in the building, structure or land is under attachment when the statement of the account is filed, the attaching creditor shall be preferred to the extent of the value of the buildings and land as they were at the time when the labor was commenced or the materials furnished for which the lien is claimed, and the court shall determine, as provided in sec. 15, what proportion of the proceeds of the sale shall be held subject to the attachment, as derived from the value of property at such time. If the attaching creditor recovers judgment, the proceeds so held subject to his attachment, or as much thereof as may be necessary, shall be applied upon his execution and the residue, if any, in the same manner as if there had been no such attachment.

26. If the interest of the owner of the property is attached after the filing of the statement, the proceeds of the sale, after



discharging all prior liens and claims, shall be applied to satisfy the execution of the attaching creditor, in the manner provided in chapter one hundred and seventy-seven for two or more successive attachments or seizures on execution of a right of redemption.

27. Attaching creditors, as between themselves, shall be paid according to the order of their attachments. If several creditors who are entitled to the lien have equal rights as between themselves and the fund is insufficient to pay them in full, they shall share the funds in proportion to their respective debts.

28. A person who has an interest in property upon which the lien has been claimed may at any time before final judgment dissolve the lien upon his interest in the whole or any part of the property by giving bond to the party claiming the lien, with sureties who shall be approved in writing by him or his attorney, by a justice of a police, district or municipal court, or by a master in chancery, conditioned to pay to such person within thirty days after final judgment an amount fixed as the value of said interest or so much thereof as may be necessary to satisfy the amount for which said interest may be found to be subject to such lien. If the parties do not agree as to the value of said interest, it may be fixed in accordance with the provisions of secs. 121 and 122 of chapter 167. The bond shall contain a description of the property or interest to be released and the obligor shall, within ten days after its approval, cause it to be recorded in the registry of deeds for the county or district in which the property lies. The lien shall not be dissolved until the bond has been so recorded, after which the bond may be taken by the obligee from the registry.

29. The clerk of the court in which the petition is pending shall forward to the registrar of deeds for the county or district in which the property lies a certificate of the fact and manner of a dissolution of the lien, whenever such dissolution appears

of record therein. The register shall file such certificate with the statement mentioned in sec. 6 and shall make a record thereof with the record of said statement.

30. A person to whom a debt for performing or furnishing labor or furnishing material on property would be payable if no lien existed thereon in behalf of another person under the provisions of this chapter may dissolve any such existing lien, except one solely for the personal labor of the petitioner, by giving bond as provided in the two preceding sections, conditioned to pay to the person claiming the lien within thirty days after final judgment the amount, if any, for which such lien shall be established, with costs upon the petition. Unless the bond is approved by the party claiming the lien or his attorney, the sureties thereon shall not be approved unless the magistrate finds that each surety, if there are two only, is worth in excess of his debts an amount equal to twice that for which the lien is claimed or that the sureties, if there are more than two, are together so worth four times that amount.

31. If a debt secured by the lien has been paid, the creditor or his attorney shall, at the expense of the debtor, enter a discharge of his lien on the margin of the record of the statement or shall execute a release which may be recorded in the registry in which the statement is recorded.

32. If the person for whom the labor has been performed or furnished or the materials have been furnished has an estate less than a fee simple in the land, or if the property is subject to a mortgage or other incumbrance, the lien shall bind such person's whole estate and interest in the property, and such estate or interest may be sold and the proceeds applied according to the provisions of this chapter.

33. The provisions of this chapter shall not prevent a person entitled to a lien under it from maintaining an action at law as if he had no lien.



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